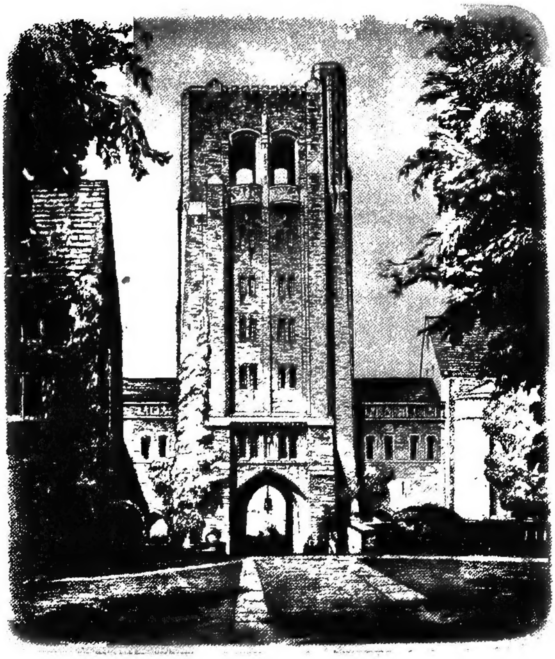

To L. A. T.

Save for the two years during which the final preparation of the manuscript of this work has withdrawn me from your society, you have been the companion of this and of my other literary labors. I can trace on almost every page of my works on the law, the record of your intelligent, patient, and loving assistance. I obey the first impulse of my heart in reserving this page for a public acknowledgment to you; knowing that, however much you may shrink from publicity, it will be gratifying to our children that your name is linked with mine, as your life and fortunes have been, on a page of the most important, and, I trust, the most permanent, of my published works. Let us trust that it shall be to them like an inscription on a monument, inciting them to honorable endeavor, long after we shall have "passed to where, beyond these voices, there is peace."

PREFACE.

THIS is an attempt to state the law relating to corporations existing in the United States, except those created for governmental purposes. As will be seen by the analysis of the whole work which immediately follows this preface, it is divided into nineteen separate titles. So great is the extent and variety of the questions under consideration that it has been found necessary to distribute the matter in these titles into no less than two hundred and one chapters. Many of these chapters are so large that it has been necessary to subdivide them into sub-chapters, called articles. For example, one of these chapters contains fifteen, another twelve, others seven, and still others lesser numbers of these articles; so that many of the so-called chapters are really extensive titles. In many cases it has been found necessary, for the convenient and accurate grouping of subjects, to subdivide these articles into sub-articles, called subdivisions. The whole work is again divided into about eight thousand separate paragraphs, called sections. These sections form the units of grouping, of reference, and of indexing. The whole work is comprised in six volumes, of about eleven hundred pages each.

The author finds his justification for the publication of so large a work upon a single title of the law, in the vast,

exuberant, and intertangled growth of uncodified and unassorted statutes and judicial decisions, the work of near fifty independent sovereignties and jurisdictions, which we in America call our law. He also finds it in the fact that upon no subject in that law has this growth been as rapid and as rank as upon the subject here under consideration. The statement of a single fact, made by Mr. Justice Field in his oration delivered at the centennial celebration of the Supreme Court of the United States, in the city of New York in 1890, that four-fifths of the wealth of the country is held by corporations, will give emphasis to what is here said.[1] Since, under our mixed system of State and Federal government, this law cannot be the work of one supreme national legislature, nor of one supreme national tribunal, it necessarily exists in some fifty collections or groups of statutory and case-made rules, which form what is called the law in each particular State of the Union. These collections or groups of rules differ in many cases essentially from each other, and the rules established by the courts of the States differ in many instances from those established by the Federal judicatories; and in some cases, as has been pointed out,[2] the Federal judicatories have even declined to follow and apply the law as enacted by the Legislature of the State in which the rights in controversy arose. Nevertheless, there is on the more important subjects a general uniformity, not only in the adjudged, but also in the statute law. Such being the state of the law in the United States, an author who proposes to himself the ambitious task of collecting and stating the whole law upon a given subject must, if his work would have the semblance of completeness in any particular State, collect and state the law as it exists in that particular jurisdiction. This requires him to collect and state the law, however dis-

---

[1] 24 Am. Law Rev. 364.

[2] *Post*, § 1669, *et seq.*

cordant, as it exists in all the different American jurisdictions, Federal and State.

This work was commenced more than sixteen years ago. It was designed and announced in 1883 to be in three volumes; it has grown to six, and it has required much condensation to bring the text within the limits of six thousand pages. Its completion has been interrupted by other labors, and especially by a tour of twelve years of judicial service in an overburdened appellate court. Since its commencement great changes have taken place in the American law of private corporations. The American doctrine that the capital stock of a corporation, including its unpaid share subscriptions, is a trust fund for its creditors, has, during that period, been greatly modified—so much so, that it may now be doubted whether the capital of a corporation is a trust fund for its creditors in any different sense than the sense in which the property of a private person is a trust fund for his creditors.[1] The doctrine formerly held by many of the State courts and emphasized by a decision of the Supreme Court of the United States,[2] and still firmly insisted upon in England,[3] that the shares of a corporation can be sold and distributed only at their full value, either in money or in property, has been greatly shaken, if not overthrown, by recent decisions of the Supreme Court of the United States.[4] The doctrine, established some twenty years ago by decisions of the Supreme Court of the United States,[5] that it is not unconstitutional for the Legislatures of the States, in the exertion of the police power, to limit the maximum charges of

---

[1] *Post*, § 1569, *et seq.;* § 2951, *et seq.;* with which compare § 1665, *et seq.*

[2] Upton *v.* Tribilcock, 91 U. S. 45; *post*, § 1568.

[3] Ooregum Gold Mining Co. *v.* Roper [1892], A. C. 195, H. L. See also, *post*, § 1615.

[4] *Post*, § 1665, *et seq.*

[5] Munn *v.* Illinois, 94 U. S. 113, and other cases.

corporations, and even of private persons, whose business is "clothed with a public interest," has been greatly shaken by a subsequent decision of the same court,[1] and may be said to be now tottering in the balance.[2] On the other hand, the protection of corporate rights under those clauses of the Federal Constitution which prohibit the States from depriving any person of his property without due process of law, and from denying to any person the equal protection of the laws,[3] has been undergoing a steady, though a generally conservative progression. Again, during the period in which this work has been under preparation, corporations engaged in similar industries have, for the purpose of reducing competition among themselves and of engrossing the markets in respect of their products, formed themselves, under various schemes, into extensive combinations or partnerships, called "trusts." These, in turn, have been the subjects of severe repressive legislation, both Federal and State, and the public opposition to them has called forth a totally new group of judicial decisions.[4] These, and other topics in respect of which the law has undergone a recent development, have been, for obvious reasons, treated with more fullness of detail than those topics in respect of which the law has become settled.

It should be stated, moreover, that the plan upon which this work was originally projected, and to which the author has endeavored to adhere throughout, has been to treat every topic with such fullness of detail that the state of the law in respect of it could be learned *from the pages of the*

---

[1] Chicago etc. R. Co. *v.* Minnesota, 134 U. S. 418.

[2] In Brass *v.* North Dakota, 153 U. S. 391, the doctrine of Munn *v.* Illinois was reaffirmed by a bare majority of the court. Compare Reagan *v.* Farmers' Loan etc. Co., 154 U. S. 362.

[3] Const. U. S., 14th Amendment. See *post*, ch. 117, art. II, and ch. 118.

[4] *Post*, ch. 142.

work, and without the necessity of the reader searching the adjudged cases. To this end the author has endeavored to state not only what the courts have decided, but also the reasons which they have given for their decisions, and the applications which they have made of them to various states of fact. It may be that he has erred in the direction of too much detail; but he has continually wrought under the dread of reaching the opposite extreme, that of making a work which should be a mere collection of ultimate decided points, huddled together in some sort of grouping,—in short, a work which would deserve no better title than that of a mere index to the decisions of the courts.

The author can only say to his professional brethren, by way of apology for whatever defects may be found in this work, that he has tried hard to serve them, and that, in this effort, he has bestowed greatly more labor upon it than upon all his previous published works in the aggregate. It is the first of his works which he has ventured to dignify with the name of "Commentaries." He has felt justified in this by the character of treatment originally proposed and in the main carried out,—that of analyzing and classifying a great and more or less conflicting mass of statute and case law, of drawing the conflicting decisions into comparison, and of making such *comments* upon their respective merits as a long study of the subject seemed to justify him in making. If these comments have been at times severe, he can only say that they were such in each case as seemed proper to him at the time when the particular topic was under study; and that, notwithstanding the criticism which he has felt called upon to bestow upon some judicial decisions, he parts with his task with an increasing admiration for the general sense of justice which pervades the work of the English and American Judges. In this expression of admiration he also includes a Bar, second to none

in the world, without whose co-operation the Judges never could have produced a mass of materials of jurisprudence such as that possessed by the Anglo-American family,—an accumulated treasure possessed by no other people that has lived in the tide of time. Nor can the author suppress the confession that, during the long and weary years in which he has been engaged upon his task, the self-accusing doubt has often forced itself upon him, whether he was indeed exercising the dignified office of a commentator, or the more humble office of a mere carpenter-and-joiner of other men's ideas.

It should be stated that two works previously published by the author on topics connected with the law of corporations,[1] having done their work, such as it was, and had their day, have been suppressed in their original form, and their contents, so far as deemed worth preserving, have been, after suitable revision, retained in the present work. As these works are in all the public, and in most of the private, law libraries in the country, they have been cited a few times in the present work, where they have contained details which it has been thought not necessary to include herein,—the former as "Thomp. Stockh.," and the latter as "Thomp. Off. Corp."

It affords the author great pleasure to state that, during the period in which this work has been under preparation, he has received, from time to time, some assistance from others, which, while important in itself, and duly appreciated, has been inconsiderable in comparison with the whole work. Many years ago Mr. Edwin G. Merriam, of the St. Louis Bar, who was the author's associate in literary

---

[1] "A treatise on the Law of Stockholders in Corporations," originally published in 1877, and not since revised; and a work called "The Liability of Directors and Other Officers and Agents of Corporations, Illustrated by Leading Cases and Notes," originally published in 1880, and not since revised.

work of this kind, did a considerable amount of work of a high grade, which has found its way into three titles, that relating to directors, that relating to ministerial officers, and that relating to actions by and against corporations. If that capable lawyer shall have the curiosity to search in the following pages for these children of his brain, he will, no doubt, be disappointed at finding them almost buried under the subsequent accumulations of fifteen years. The author also acknowledges valuable assistance from the late Judge William P. Wade, of California, author of several able legal treatises; from Professor James A. Yantis, of the University of Missouri; and from Mr. William L. Murfree, Jr., Mr. Virgil Rule, and Mr. S. S. Merrill, all of the St. Louis bar. And if he has omitted to mention any others, it should be charitably ascribed to that forgetfulness which comes with the lapse of time. With these exceptions, the work is the personal work of the author, and is founded upon his personal examination of the cases and statutes therein cited.

I should deserve the accusation of ingratitude if I were to omit, in conclusion, to return public thanks to my publishers, the Bancroft-Whitney Company, who, during a long succession of delays and disappointments, have maintained their faith in my ultimate success, and have supported my efforts to an extent which deserves to be described as heroic.

I also take this occasion to return to my professional brethren my sincere thanks for the generous indulgence which they have extended to the faults of my previous works.

And to that good Being who has given me the strength to persevere to the end, through so many years of toil and discouragement, I tender my most grateful acknowledgments.

SEYMOUR D. THOMPSON.

SAINT LOUIS, January 1, 1895.

AN ANALYSIS OF THE WHOLE WORK.

TITLE I.

ORGANIZATION AND INTERNAL GOVERNMENT.

TITLE II.

CAPITAL STOCK AND SUBSCRIPTIONS THERETO.

TITLE III.

REMEDIES AND PROCEDURE TO ENFORCE SHARE SUBSCRIPTIONS.

TITLE IV.

SHARES CONSIDERED AS PROPERTY.

TITLE V.

LIABILITY OF STOCKHOLDERS TO CREDITORS.

TITLE VI.

DIRECTORS.

TITLE VII.

RIGHTS AND REMEDIES OF MEMBERS AND SHAREHOLDERS.

TITLE VIII.

MINISTERIAL OFFICERS AND AGENTS.

TITLE IX.

FORMAL EXECUTION OF CORPORATE CONTRACTS.

TITLE X.

NOTICE, ESTOPPEL, RATIFICATION.

TITLE XI.

FRANCHISES, PRIVILEGES, AND EXEMPTIONS.

TITLE XII.

CORPORATE POWERS AND THE DOCTRINE OF ULTRA VIRES.

TITLE XIII.

CORPORATE BONDS AND MORTGAGES.

TITLE XIV.

TORTS AND CRIMES OF CORPORATIONS.

TITLE XV.

INSOLVENT CORPORATIONS.

TITLE XVI.

DISSOLUTION AND WINDING UP.

TITLE XVII.

RECEIVERS OF CORPORATIONS.

TITLE XVIII.

ACTIONS BY AND AGAINST CORPORATIONS.

TITLE XIX.

FOREIGN CORPORATIONS.

CONTENTS OF VOLUME I.

CONTENTS OF VOLUME I.

TITLE ONE.

ORGANIZATION AND INTERNAL GOVERNMENT.

CHAPTER I.

NATURE AND KINDS OF CORPORATIONS.

CHAPTER II.

CREATION BY SPECIAL CHARTERS.

CHAPTER III.

ACCEPTANCE OF SPECIAL CHARTERS.

CHAPTER IV.

AMENDMENT OF CHARTERS.

CHAPTER V.

CHARTERS GRANTED BY THE COURTS.

CHAPTER VI.

ORGANIZATION UNDER GENERAL LAWS.

ARTICLE I. PURPOSES FOR WHICH INCORPORATION PERMITTED.

SUBDIVISION I. Examples from Various Statutes.

SUBDIVISION II. Decisions Construing Particular Statutes.

ARTICLE II. STEPS NECESSARY TO PERFECT ORGANIZATION.

CHAPTER VII.

REORGANIZATION.

CHAPTER VIII.

NAMES OF CORPORATIONS.

CHAPTER IX.

CONSOLIDATION.

ARTICLE I. IN GENERAL.

ARTICLE II. EFFECT UPON SHAREHOLDERS.

ARTICLE III. TRANSMISSION OF RIGHTS AND LIABILITIES OF CONSTITUENT COMPANIES.

ARTICLE IV. EFFECT ON REMEDIES AND PROCEDURE.

CHAPTER X.

PROMOTERS.

ARTICLE I. LIABILITY ON THEIR CONTRACTS.

Article II. Liability to Subscribers.

Article III. Liability to the Company.

Article IV. Non-liability of the Company for Contracts of Promoters.

CHAPTER XI.

IRREGULAR AND DE FACTO CORPORATIONS.

ARTICLE I. DE FACTO CORPORATIONS.

ARTICLE II. CORPORATIONS BY ESTOPPEL.

CHAPTER XII.

CONSTITUTIONAL RESTRAINTS UPON THE CREATION OF CORPORATIONS AND THE GRANTING OF CORPORATE PRIVILEGES.

ARTICLE I. PROVISIONS OF VARIOUS STATE CONSTITUTIONS.

ARTICLE II. RESTRAINTS UPON THE PASSAGE OF SPECIAL STATUTES CONFERRING CORPORATE PRIVILEGES.

ARTICLE III. RESTRAINTS AS TO THE TITLES OF LAWS

ARTICLE IV. RESTRAINTS AS TO THE MODE OF PASSING LAWS.

ARTICLE V. VARIOUS OTHER RESTRAINTS AND PROVISIONS.

CHAPTER XIII.

NATIONAL CORPORATIONS.

CHAPTER XIV.

PLACE OF HOLDING CORPORATE MEETINGS AND OF DOING CORPORATE ACTS.

CHAPTER XV.

CORPORATE ELECTIONS.

ARTICLE I. ASSEMBLING THE MEETING.

ARTICLE II. THE QUORUM

ARTICLE III. RIGHT TO VOTE.

ARTICLE IV. CONDUCT OF THE ELECTION.

ARTICLE V. RIGHT TO THE OFFICE: CONTESTING THE ELECTION.

CHAPTER XVI.

AMOTION OF OFFICERS.

CHAPTER XVII.

EXPULSION OF MEMBERS.

ARTICLE I. POWER TO EXPEL: GROUNDS OF EXPULSION.

ARTICLE II. CORPORATE PROCEEDINGS TO EXPEL.

ARTICLE III. JUDICIAL PROCEEDINGS TO REINSTATE.

CHAPTER XVIII.

BY-LAWS.

ARTICLE I. NATURE AND INTERPRETATION.

ARTICLE III. REQUISITES AND VALIDITY.

TITLE TWO.

CAPITAL STOCK AND SUBSCRIPTIONS THERETO.

CHAPTER XIX.

NATURE OF CAPITAL STOCK AND SHARES IN GENERAL.

CHAPTER XX.

WHO MAY BECOME SHAREHOLDERS IN CORPORATIONS.

ARTICLE I. NATURAL PERSONS.

ARTICLE II. PRIVATE CORPORATIONS.

ARTICLE III. MUNICIPAL CORPORATIONS.

CHAPTER XXI.

THE CONTRACT OF SUBSCRIPTION.

ARTICLE I. THEORIES AS TO THE NATURE AND FORMATION OF THE CONTRACT.

ARTICLE II. THEORIES AS TO THE CONSIDERATION.

ARTICLE III. THEORIES AS TO THE NECESSITY OF PAYING THE STATUTORY DEPOSIT.

ARTICLE IV. THEORY THAT THE FULL AMOUNT OF THE CAPITAL MUST BE SUBSCRIBED.

ARTICLE V. OTHER THEORIES AND HOLDINGS.

CHAPTER XXII.

ALTERATION OF THE CONTRACT.

[*Title II is continued in Volume II.*]

TITLE ONE. ORGANIZATION AND INTERNAL GOVERNMENT.

CHAPTER I.

NATURE AND KINDS OF CORPORATIONS.

§ 1. **What is a Corporation?** — The most usual conception of a corporation is that it is a collection of natural persons, joined together by their voluntary action or by legal compulsion, by or under the authority of an act of the legislature, to accomplish some purpose, pecuniary, ideal, or governmental, authorized by the legislature, under a scheme of organization and by methods thereby prescribed or permitted: with the faculty of having a continuous succession during the period prescribed by the legislature for its existence, of having an individual name by which it may make

and take contracts and sue and be sued, and of acting as a unit in respect of all matters within the scope of the purposes for which it was created.

§ 2. **Judicial Definitions of a Corporation.** — A corporation aggregate has been defined to be, "an artificial being created by law, and composed of individuals who subsist as a body politic under a special denomination, with the capacity of perpetual succession, and of acting, within the scope of its charter, as a natural person." [1] The following is the definition given by Chief Justice Marshall in the Dartmouth College case: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are *immortality* and, if the expression may be allowed, *individuality;* properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual." [2] In two early cases in New York, the question, what is a corporation was discussed with exhaustive research. On one of these cases the court, speaking through Nelson, C. J., said: "We may, in short, conclude by saying, with the most approved authorities at this day, that the essence of a corporation consists in a capacity (1) to have perpetual succession under a special name and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and (3) to receive and enjoy, in common, grants of privileges and immunities." [3] In the same case [4] Cowen, J., summed up the incidents of a corporation mentioned by Blackstone, as follows: "These are, in short, the receiving of peculiar laws, and the making of by-laws for itself; perpetual succession both as to its privileges and property; the having one will, as collected from the power of the majority to make by-laws; and the being but one person in law, — a person that dies not, but continues the same individual though its parts may change." The definition of Kyd has been frequently quoted: "Though many things be incident to a corporation, yet, to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: (1) To have perpetual succession under a special denomination, and

[1] Fietsam *v.* Hay, 122 Ill. 293; *s. c.* 3 Am. St. Rep. 492, 493.

[2] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 636.

[3] Thomas *v.* Dakin, 22 Wend. (N. Y.) 71.

[4] Thomas *v.* Dakin, 22 Wend. (N. Y.) 91.

under an artificial form; (2) to take and grant property, to contract obligations, and to sue and be sued by its corporate name in the same manner as an individual; (3) to receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation."[1] In the other case above referred to this definition was given: "A corporation aggregate is a collection of individuals united in one body under such a grant of privileges as secures the succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person."[2] In the former case, where the subject was thoroughly considered, it was said by Cowen, J.: "It has been impossible for me to see the force of the argument that, because the legislature have constantly avoided to call these associations, or any of their machinery, a *corporation*, therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the legislature expressly declare each of them to be corporations, without giving them corporate succession or other artificial attributes, the declaration would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations would not change their character, provided they should in fact be clothed with all the essential powers of corporations."[3] It should be added that the fact that the legislature has designated a given body as a corporation, or refused the application of such a designation, is not conclusive upon the question whether or not it is to be deemed a corporation by the courts.[4] It was held by Mr. Justice McLean at circuit in a case of great importance that an association authorized by a general law providing the mode in which associations shall be organized, conferring upon them the ordinary powers of corporations, and expressly providing that such an association, when formed, shall "constitute a body corporate and politic in fact and in name," is a corporation;[5] and such is now the universally accepted rule.

[1] 1 Kyd on Corp. 70.

[2] Bronson, J., in People *v.* Assessors of Watertown, 1 Hill (N. Y.), 620.

[3] Thomas *v.* Dakin, 22 Wend. (N. Y.) 103.

[4] Oliver *v.* Liverpool, &c., Co., 100 Mass. 531; *s. c. sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566 *post;* § 6.

[5] Falconer *v.* Campbell, 2 McLean (U. S.), 195; *s. c.* 10 Myer Fed. Dec., § 8. In a proceeding by *mandamus* to restore a person to the place of alder-

§ 3. A Collection of Incidents which make a Corporation.— An English *joint-stock company* possessing the following characteristics was held to create a corporation, in the sense in which the word is used in America, and so as to be a subject of taxation under a statute of one of the American States, in which it maintained an office and carried on its business: "1. It has a distinctive and *artificial name*, by which it can make contracts. 2. It has a statutory provision, by which it can *sue and be sued* in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit. 3. It has a provision for *perpetual succession* by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who shall die or sell out. 4. Its existence as an entity, apart from the shareholders, is recognized by the act of Parliament which enables it to *sue its shareholders and be sued by them.*" "It is believed," said Mr. Justice Miller, "that, in all the States, the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under the general laws, or it would become so by such legislative ratification as is given by the acts of Parliament we have mentioned."[1]

§ 4. None the less a Corporation because Members Liable for its Debts. — "To this view," continued Mr. Justice Miller, "it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But, however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."[2]

§ 5. Nor because it cannot Sue nor be Sued in its Corporate Name. — "So also," continued Mr. Justice Miller, "it is said that

man of the City of London, Serjeant Pemberton in argument gave this definition of a corporation: "That a corporation is an artificial body composed of divers constituent members *ad instar corporis humani*, and that the ligaments of this artificial body politic or artificial body are the franchises and liberties thereof, which bind and unite all its members together, and the whole frame and essence of the corporation consist therein; and when a *quo warranto* is brought against a corporation the writ calls it a franchise, which is very properly." Sir James Smith's Case, Carth. 217; *s. c.* Skin. 293, 310; 4 Mod. 52; 1 Show., 263, 274.

[1] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566, *s. c.* 10 Myer Fed. Dec., § 17.

[2] Liverpool Ins. Co. *v.* Mass., 10 Wall. (U. S.) 566; *s. c.* 10 Myer Fed. Dec., § 18.

the fact that there is no provision, either in the deed of settlement or the act of Parliament, for the company suing or being sued in its artificial name, forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament which authorized suits in the name of the Liverpool & London Fire and Life Insurance Company, and that which authorized suit against that company *in the name of its principal officer.* If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same; for process would have to be served on some such officer, even if the suit were in the artificial name." [1]

§ 6. **Nor because Acts of Parliament Declare that it shall not be a Corporation.** — Nor is an English joint stock company, doing business in America, to be regarded as an unincorporated association within the meaning of our laws, from the mere fact that the acts of Parliament under which it is organized expressly declare that they shall not be held to constitute the body a corporation. "Whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation, or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technical corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body. The question before us is, whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals. We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal constitution, or of any treaty protected by said constitution." [2]

[1] Liverpool Ins. Co. *v.* Mass., 10 Wall. (U. S.) 566, 575; *s. c.* 10 Myer Fed. Dec., § 19.

[2] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566, 576; *c.* 10 Myer Fed. Dec., § 19. Mr. Justice Bradley agreed with the general result reached, but held that the company was a special partnership, and could not maintain an action or be

§ 7. A Collection of Natural Persons. — "Corporations," said Lumpkin, J., "are but associations of individuals."[1] In joint-stock companies these individuals are called the stockholders;[2] in municipal corporations they pass under the various names of citizens, burgesses, freemen, etc.; and in private corporations formed for social, religious, benevolent or other ideal purposes they are commonly called members. It is not, however, strictly necessary to the legal existence of a stock corporation that its shares should be held by individuals. As will be seen hereafter, its shares may be held by partnerships,[3] by other corporations,[4] or even by the State. About fifty years ago several of the States created banking corporations known as *State banks*, in which the State was a holder of all or a portion of the shares. The fact that the State was the sole stockholder in such a bank did not change the relation which the bank, as a corporation, sustained to its creditors.[5] In such a case the State, by becoming a stockholder in a business corporation, divests itself, *pro hac vice*, of its attributes of sovereignty, and places itself on the same footing which a private person, holding shares of stock in such a corporation, would occupy in respect of its creditors, so far as the question of priority is concerned.[6]

sued as a corporation in this country without legislative aid.

[1] Hightower *v.* Thornton, 8 Ga. 492.

[2] "Who, in law, constitutes the company, if it be not the stockholders?" Lowe, J., in Gelpcke *v.* Blake, 19 Ia. 268.

[3] *Post*, § 1090, *et seq.*

[4] *Post*, § 1108. Where the charter of a bank provided that *charitable societies* might, from time to time, subscribe for stock of the bank in addition to its fixed capital, which stock was not transferable, and might be withdrawn at par on certain notice, and the bank had declared a dividend from its surplus earnings, — it was held that the societies subscribing were shareholders, with all the right of individual shareholders, and entitled to receive their proportion of the dividend, although the fund from which it was declared was earned in great part before they became stockholders. Phelps *v.* Farmers' &c. Bank, 26 Conn. 269.

[5] State *v.* Bank of the State, 1 S. C. 63. In this case it was held that although the capital of a bank is furnished by the State under the laws of which it was incorporated, and the profits thereof inure to the benefit of that State, and the faith of that State is pledged to its support, yet such bank is a distinct corporation, having the ordinary powers and rights, and subject to the ordinary obligations of banking corporations, with liability to suits by creditors, and holding its property subject to the claims of these in preference to the claims of the State as the only stockholder.

[6] United States *v.* Planters' Bank,

§ 8. Corporations Sole. — The conception of a corporation composed of a single person seems to be passing out of the American law. The usual illustration of a corporation sole, such as a bishop of the church of England, conveys to the mind the idea of an official or trustee who possesses certain powers which he transmits to his successor in office or trust. A minister seized of parsonage lands in right of the parish has been regarded as a corporation sole, for the purpose of holding such lands, so that his title passes to his successors in the office.[1] It has been said that a supervisor of a town is, *sub modo*, a sole corporation.[2] In England this character has been ascribed to the king, "to prevent, in general, the possibility of an *interregnum*, or vacancy of the throne, and to preserve the possession of the crown entire."[3] On a similar conception this quality has been ascribed to the governor of a State.[4] But it is not perceived why the same quality might not, upon equal grounds, be ascribed to any public official. Even where the corporation is composed of more than one person, the legislature have power to permit *one person* or his successor to exercise all the corporate powers, and to make his acts, when acting upon the subject-matter of the corporation, and within its sphere of action and grant of powers, the acts of the corporation.[5] It has been held that the grant of corporate powers to a person named, "and his *associates*," virtually confers upon him alone the powers so granted, and does not make it necessary that he should take any associates.[6] A peculiar quality of corporation sole at common law was that it had perpetual succession, so

9 Wheat. (U. S.) 907. Compare Curran *v.* Arkansas, 15 How. (U. S.) 304.

[1] Brunswick *v.* Dunning, 7 Mass. 447; Weston *v.* Hunt, 2 Mass. 501. A Roman Catholic archbishop has been held in respect of land held by him for the church, a corporation sole, and hence not liable to be proceeded against personally for street improvements. Roman Catholic Archbishop *v.* Shipman, 79 Cal. 288.

[2] Jansen *v.* Ostrander, 1 Cow. (N. Y.) 670, 684. But an officer or agent of a corporation, appointed by its board of directors or trustees, does not possess the faculties of a corporation sole. The treasurer of the trustees of Davidson College is not a corporation sole. Hence, a suit on a bond payable to him as such, and his successors, cannot be brought in the name of a successor. McDowell *v.* Hemphill, 1 Winst. (N. C.) 96.

[3] 1 Black. Com. 470.

[4] Governor *v.* Allen, 8 Humph. (Tenn.) 176, per Turley, J. See also Polk *v.* Plummer, 2 Humph. (Tenn.) 500.

[5] Penobscot Boom Corp. *v.* Lamson, 16 Me. 224.

[6] Day *v.* Stetson, 8 Me. 365; Penobscot Boom Corp. *v.* Lamson, 16 Me. 224. The rule is of course the same where the corporate powers are granted to *several persons* named in the grant and "to their associates and assigns;" here the persons named may exercise the corporate powers without taking to themselves associates. Hughes *v.* Parker. 20 N. H. 58. See *post*, § 43.

to speak, as to *real property*, but not as to *personal property*, — that is to say, real property would descend to the successor in corporate right of the person who constituted the sole corporation, but personal property would pass to his next of kin by the ordinary law of distribution. Blackstone gives the inconclusive reason for this anomaly that, as movable property is liable to be lost or embezzled, a rule that would keep it in the line of corporate succession would raise endless disputes between the corporate successor and the executor.[1]

§ 9. **Ordinary Powers of a Corporation.** — "The ordinary powers of a corporation are: 1. Perpetual succession. 2. To sue and be sued, and to receive and grant, by their corporate name. 3. To purchase and hold lands and chattels. 4. To have a common seal. And, 5. To make by-laws. Some of these powers are incident to a corporation, but they are all, generally, expressly given by statute in this country."[2]

§ 10. **Immortality — "Perpetual Succession."** — It is frequently said that one of the attributes of a corporation aggregate is immortality.[3] Most of the charters of private corporations provide in terms that they shall have "perpetual succession," and general statutes governing the organization of corporations frequently contain the same provision. This means, in a general sense, that the corporation is endowed with the faculty of existing forever, unless the same, or another statute, or the constitution has fixed a limit to the term of its existence. In other words, the term "perpetual succession" is understood to mean indefiniteness of duration.[4] Another court has reasoned that the

[1] 2 Bla. Com. 432. Where a statute incorporated three persons named, their *associates and successors*, by the name of "the president, directors and company of the Lechmere Bank," — it was held that, by the word "associates," the legislature *prima facie* intended those who were associated with the three persons named as petitioners for the bank, praying that they might be so incorporated, and that upon the evidence in the case, could not have intended to include other persons who did not sign the petition for the bank, but who merely subscribed for stock in the same, in sundry books prepared and circulated at the meeting when the enterprise originated, and where the petition to the legislature was drawn up and signed. Lechmere Bank *v.* Boynton, 11 Cush. (Mass.) 369.

[2] Mr. Justice McLean, in Falconer *v.* Campbell, 2 McLean (U. S.), 195, 198; *s. c.* 10 Myer Fed. Dec., § 8.

[3] Fuller *v.* Academic School, 6 Conn. 532, 543.

[4] Fairchild *v.* Masonic Hall Asso-

words do not refer to length of time, but rather convey the idea of regularity or unbroken continuity of existence.[1]

§ 11. **In what Sense a "Person."** — For many — perhaps most purposes, a corporation is in law an ideal person. It is regarded as a unit for most purposes of legal procedure. It makes and takes contracts by its corporate name, and in that name it sues and is sued. The word "person" in a statute may be construed to refer to a corporation, as well as to a natural person.[2] Accordingly, a corporation has been held to be embraced within the words of the statute of Anne, re-enacted in the various American States, which provides that "all notes in writing made and signed by any person, whereby he shall promise to pay to another person, or his order," etc., "shall be negotiable," etc. Here the word "person" includes a corporation, and accordingly a note made payable to a corporation is, by force of this statute, negotiable.[4]

ciation, 71 Mo. 526; State *v.* Stormont, 24 Kan. 686.

[1] Scanlan *v.* Crawshaw, 5 Mo. App. 337. While this conception of the meaning of the term perpetual succession seems to be sound, the decision was unsound. By a general law of the State of Missouri it was provided that corporations, whose charters did not otherwise provide, should expire upon the limitation of twenty years. Many corporations in that State were created by special charters, and the only duration prescribed therein was found in the words "perpetual succession." It was held, on the reasoning stated in the text, that, where a corporation was created at a time when this general law was in force, having no other period of limitation prescribed than such as was found in the words "perpetual succession" in its charter, it expired by limitation in twenty years. Scanlan *v.* Crawshaw, 5 Mo. App. 337. This decision, which had the effect of abolishing many of the alleged business corporations of the State, was followed by the same court in Fairchild *v.* Hunt, 5 Mo. App. 583, but the point was overruled by the Supreme Court in same case on appeal, *sub nom.* Fairchild *v.* Mechanics' Hall Association, 71 Mo. 526. In Krutz *v.* Paola Town Company, 20 Kan. 397, the same view was taken as that taken in the Missouri Court of Appeals, — that, in the absence of a special period of limitation in the charter, the period of the general law governs. See *post*, Ch. 153. Under Texas act of 1874, relating to corporations, as under the act of 1871, a corporation is entitled to succession by its corporate name for twenty years where its charter does not limit the time. Steadman *v.* Merchants' and Planters' Bank, 69 Tex. 50.

[2] People *v.* Utica Insurance Co., 15 Johns. (N. Y.) 358; *s. c.* 8 Am. Dec. 243; Cary *v.* Marston, 56 Barb. (N. Y.) 29; U. S. Tel. Co. *v.* Western Union Tel. Co., *Id.* 53. Compare Ahern *v.* National Steamship Co., 11 Abb. Pr. (N. S.) (N. Y.) 356.

[4] State of Indiana *v.* Woram, 6 Hill (N. Y.), 33; *s. c.* 40 Am. Dec. 378.

§ 12. In what Sense a "Citizen."—A corporation is a citizen within the meaning of the act of Congress,[1] which allows a citizen of one State to bring an action against a citizen of another State, in a circuit court of the United States. For the purposes of Federal jurisdiction a foreign corporation is a citizen of the State by which it is created and within which it does business.[2] When sued in a State court it may, therefore, as a citizen of the State of its creation, *remove the cause* to the Circuit Court of the United States, in like manner as a non-resident citizen might.[3] But it is a settled principle of constitutional law that it is not a citizen, within the meaning of that clause of the constitution of the United States[4] which declares that "the citizens of each State shall be entitled to all *privileges* and *immunities* of citizen in the several States."[5]

§ 13. Distinction between a Corporation and a Partnership. — A corporation differs from a general partnership in the following particulars: 1. Its members may, in general, without restraint, by transferring their shares, introduce other persons in their stead;[6] but the members of a general partnership contribute to the common enterprise, not only their respective shares of the partnership capital, but also their personal skill and individual credit, and cannot, hence, retire from the partnership,

The statute of New York under this head, out of abundant caution, contains the provision that the word person, as therein used, "shall be construed to extend to every corporation capable by law of making contracts." 1 R. S. N. Y. 768. So a corporation is a "person" within the meaning of the mill dam act of Wisconsin. Fisher *v.* Horicorn &c. Co., 10 Wis. 351.

[1] Judiciary Act of 1789, § 11; Rev. Stat. U. S., § 629.

[2] Minot *v.* Philadelphia &c. R. Co., 2 Abb. (U. S.) 323; Hatch *v.* Chicago &c. R. Co., 6 Blatchf. (U. S.) 105; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149.

[3] Hobbs *v.* Manhattan Ins. Co., 56 Me. 417. In this last case the qualification is added, if there is nothing in the legislation of the State to prevent it. To the same effect is Morton *v.* Mutual Life Ins. Co., 105 Mass. 145; *s. c.* 7 Am. Rep. 505; Knorr *v.* Home Ins. Co., 25 Wis. 143; *s. c.* 3 Am. Rep. 26. But this qualification is understood to be not the law. *Post*, Ch. 178, Art. III.

[4] Const. U. S., Art. 4, § 2.

[5] People *v.* Imlay, 20 Barb. (N. Y.) 68; Wheeden *v.* R. Co., 2 Phil. (Pa.) 23; Ducat *v.* Chicago, 48 Ill. 172; Tatem *v.* Wright, 23 N. J. L. 429.

[6] Chouteau Spring Co. *v.* Harris, 20 Mo. 382; Moore *v.* Bank of Commerce, 52 Mo. 377; *post*, § 2300.

and introduce other persons in their stead, without the consent of their copartners. 2. The members of a general partnership are, by virtue of their *status* as such, agents of the partnership firm, and of each other, in all matters within the scope of the partnership business.[1] Not so the members of a corporation. They can only act about the business of the corporation in their aggregate capacity, through the agency of a committee, commonly called a board of directors or a board of trustees, whom they have chosen to represent them, and through such other officers as this committee may appoint.[2] 3. The members of a general partnership are jointly and severally liable to pay, out of their private estates, all the debts of the partnership firm.[3] But in the United States the members of a corporation are not, in general, liable to pay any of the corporate debts,[4] unless (1) they have received or withheld some of the assets of the corporation, or (2) unless they are otherwise made liable by the terms of the charter of the corporation or by statute.

§ 14. Differences between Corporations and Joint-stock Companies. — An English joint-stock company resembles a corporation, in respect of the fact that, by reason of the number of its members, it acts by a board of directors or trustees,[5] and sues

[1] This, however, is not a *necessary* incident of a partnership; I am merely describing the more common incidents. See Gallway *v.* Matthew, 10 East, 264.

[2] Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Ohio), 84; Dana *v.* Bank of United States, 5 Watts & S. (Pa.) 247; Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27.

[3] *Post*, § 2926.

[4] *Post*, § 2925.

[5] Burnes *v.* Pennell, 2 H. L. 520. "We are told," said Lord Campbell in this case, "that a joint-stock company (at least if not incorporated, and only empowered by a public act of Parliament, as this is, to sue and be sued by its officers), is in the same situation as any mercantile partnership consisting of two or three individuals carrying on business jointly under an ordinary deed of partnership or by a parol agreement among themselves of which the world is ignorant, in which case what is said or done by any one partner respecting the partnership business affects all the partners, although in violation of their agreement *inter se*. But why is this so? Because, carrying on business jointly under a common firm, they hold out to the world that each of them has authority to manage the partnership concerns. Therefore all are bound by what each does in conducting the partnership business. All the members of the firm are liable to the *bona fide* holder of a bill of exchange, drawn, accepted, or indorsed by any one of them. But supposing that, A., B., and C. entering into partnership, it is

and is sued as one person, or in the name of an officer;[1] but, in respect of the liability of its members for its debts, a corporation, in general, differs from a joint-stock company as it differs from a partnership: the members of a joint-stock company are, in general, liable as partners.[2] A corporation and an English

expressly stipulated that A. shall not draw, accept, or indorse bills in the partnership name, and this stipulation is known to X., he would have no remedy against B. and C. on a bill of exchange which he had induced A. to draw, accept, or indorse. Therefore, on the principle which regulates the liability of common parties, a distinction must be made between a member of a common mercantile partnership and a shareholder in a joint-stock company. No one will contend that a joint-stock company would be liable on a bill of exchange, drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange, is vested exclusively in the directors. This shows that, although a joint-stock company is a partnership, it is a partnership of different description, and attended with different incidents and liabilities, from a partnership constituted between a few individuals who carry on business jointly, with equal powers and without transferable shares. All who have dealings with a joint-stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose, it is wholly immaterial whether the company is incorporated or unincorporated." See also the observation of Earl, J., in Bray *v.* Farwell, 81 N. Y. 600, 608.

[1] Wordsworth on Joint-stock Co. 66; Oliver *v.* Liverpool, etc., Co., 100 Mass. 539; Wormwell *v.* Hailstone, 6 Bing. 668; Harrison *v.* Timmins, 4 Mee. & W. 510; Cape's Executors' Case, 2 De G. M. & G. 573; Bartlett *v.* Pentland, 1 Barn. & Adol. 704; Taft *v.* Ward, 106 Mass. 518.

[2] Ang. & Ames on Corp., § 591; Morton, J., in Hoadley *v.* County Commissioners, 105 Mass. 526; Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 542; Townsend *v.* Goewey, 19 Wend. (N. Y.) 424; Whitman *v.* Porter, 107 Mass. 522; Oliver *v.* Liverpool &c. Co., 100 Mass. 539; Dow *v.* Sayward, 12 N. H. 271; Taft *v.* Ward, 106 Mass. 518; Tappan *v.* Bailey, 4 Metc. (Mass.) 529; Tyrell *v.* Washburn, 6 Allen (Mass.), 472; Bodwell *v.* Eastman, 106 Mass. 525; Frost *v.* Walker, 60 Me. 468. The contrary was held by Chancellor Kent in Livingston *v.* Lynch, 4 Johns. Ch. (N. Y.) 573, 592. "Joint-stock companies," says Sir Nathaniel Lindley, in his work on Partnership, "are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporate companies are intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both." 1 Lindley on Part. (1st. ed.) 6. The liability or non-liability of members constitutes the most frequent test by which to determine whether a particular company is a corporation or a joint-stock company. Thus, various acts of Parliament conferred upon an insurance company most of the incidents of a corporation, but declared that such

joint-stock company likewise resemble each other in respect of the transferability of their shares, and the incident of "perpetual succession" of their members.[1] In the United States, however, an unincorporated joint-stock company, although it may possess a capital stock, divided into shares and transferable at the will of the holders, do business under a name indicating that it is a corporation, act through a common agency, and not by its individual members,[2] and hold its property in the name of a

company should not be deemed to be thereby made a corporation. It was thought by an American court that the object of this reservation was to preserve the individual liability of members. Oliver *v.* Liverpool &c. Co., 100 Mass. 539. So, acts of Parliament which provided, in substance, that a private company might be sued in the name of the managing director as a nominal party, for and on behalf of the company, that execution so obtained should be levied upon the surplus fund and other property of the corporation, and that the managing directors should not be personally responsible in respect of contracts made by them in behalf of the company, were held to create a *quasi*-corporation, and the court had no power to order an execution against a director against whom a judgment had been thus recovered. Harrison *v.* Timmins, 4 Mee. & W. 510. "It is quite clear," said Lord St. Leonards, "that the law knows no difference between a common partnership of two people and a partnership of one hundred. This company is not an ordinary partnership, but one formed under the act of 7 Geo. IV. c. 46, by virtue of which, though the public officer only can be sued, yet all the members at the time when the judgment is obtained may in the result be made liable. There is, therefore, a great difference between a company such as this taking the benefit of the Winding-up Act, and the case of a common partnership so doing. This does not, however, exclude from consideration *the provisions of* the deed of partnership." Cape's Executors' Case, 2 De G. M. & G. 573. A joint-stock company is not such a corporation as to entitle one of its officers to refuse to *produce documents* in his custody when required by *subpœna.* Woods *v.* De Figaniere, 1 Robt. (N. Y.) 659.

[1] Burnes *v.* Pennell, 2 H. L. 520.

[2] Tappan *v.* Bailey, 4 Metc. (Mass.) 529. But see The People *v.* Assessors of Watertown, where the free-banking companies of New York were held to be corporations. In this case Bronson, J., declared: "Whether a corporation or not, does not depend upon the number or magnitude of its powers nor the manner in which they were conferred. An association under our general laws, for a village library or to tan hides, possesses all the essential attributes of a corporation in as great perfection as the Bank of England or the East India Company. Nor is it important in what mode or by what particular agency this artificial being transacts its business. It is enough that it has a capacity to act in some form as a legal being." The People *v.* Assessors of Watertown, 1 Hill (N. Y.), 622. See Hoadley *v.* County Commissioners, 105 Mass. 519; Tyrrell *v.* Washburn, 6 Allen (Mass.), 466; Taft *v.* Ward, 106 Mass. 518; Bullard *v.* Kinney, 10 Cal. 60. "Companies and societies which are not sanctioned expressly by the legisla-

trustee,—is deemed to be an ordinary partnership with respect of its relations with the public, such as the manner in which it may sue and be sued,[1] its liability to taxation, and the liability of its members to its creditors. Non-liability of members to creditors will not, of itself, however, determine whether an association is a corporation or not; since, as we shall see hereafter, the members of some American corporations are liable, as partners, to its creditors.[2] Thus an English joint-stock company, possessing the general incidents of an American corporation except the non-liability of its members, and organized under acts of Parliament expressly declaring that it is not a corporation, will nevertheless be deemed a corporation in this country, for the purposes of taxation.[3] Indeed, there seems to be no substantial difference between an American joint-stock corporation and an English "company," organized under recent statutes.[4]

§ 15. Distinction between a Corporation and a Guild, Fraternity or Society. — Distinctions have been taken between a corporation and a guild, fraternity or society. It has been said that a guild, a fraternity or a society is not a corporation.[5] The distinction was that a corporation could only be created by the crown or by Parliament, but that a guild was nothing more

ture, pursuant to some general or special law, are nothing more than ordinary partnerships, and the laws respecting them are the same." Wells *v.* Gates, 18 Barb. (N. Y.) 557, *per* Clerke, J. Compare Opdyke *v.* Marble, 18 Abb. Pr. (N.Y.) 266; *s. c.* affirmed, *Id.* 375; 1 Thomp. Tr., § 747

[1] "Whatever name," said Walworth, C., "such a company may assume and use, in the transaction of its business, it is a partnership and not a corporate designation, and every suit upon a contract with the company must be brought in the names of the several persons composing the firm." Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 542. Local statutes may exist allowing such bodies to sue in the name of an officer.

[2] *Post*, Ch. 50.

[3] Oliver *v.* Liverpool &c. Co., 100 Mass. 531; affirmed *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; *ante*, § 3.

[4] Dr. Brice, in his work on Ultra Vires, enumerates these statutes under the head of "Corporations by Act of Parliament," and says: "The above statutes, and especially the Companies Acts of 1862 and 1867, enable persons, by a very simple and speedy process, to unite themselves into, and thereby create, a corporation, for almost any and every purpose of life, commercial or otherwise." Green's Brice's Ultra Vires, 24. In the United States, corporations are now, for the most part, organized under similar statutes. *Post*, Ch. VI.

[5] Year Book, 49 Edw. 3, 4b; Rex *v.* Beardwell, 2 Keb. 52.

than a fraternal society, which might be created by an ordinance or a by-law of a municipal corporation. Thus, it was said by Lord Holt in one case, with reference to a by-law of the city of London, that "the city might make a guild or fraternity of dancing masters, though they cannot make a corporation."[1]

§ **16. Composed of what Body or Constituency.** — The most usual conception of a corporation aggregate is that it is a collective body composed of its largest constituency. But this is not a universal conception. Sometimes only the board of trustees or other representative body is incorporated. This is frequently so in the case of religious societies, as will appear hereafter.[2] The trustees in whom are vested the temporalities of the church are frequently incorporated, but the body of communicants are not. So, in respect of municipal corporations, the legal conception of such a body is believed to be that it consists not of the aggregate body of inhabitants within the prescribed territory, or even of the aggregate body of inhabitants within such territory who are entitled to vote at municipal elections; but rather that it consists of the governing body, usually the mayor and common council.[3]

§ **17. Further of this Subject.** — The writer ventures the opinion that, for the purposes of substantial right, though not

[1] Robinson *v.* Groscot, Comb. 372. Whether the *Inns of Court* at Westminster Hall were corporations or merely voluntary societies, in the nature of guilds,— Case of Clement's Inn, 1 Keb. 135.

[2] *Post*, § 44. The *trustees* of a college, being incorporated, may sue by their corporate title, without setting out their individual names. Legrand *v.* Hampden Sidney College, 5 Munf. (Va.) 324. The *trustees* of the university of Louisville, as originally incorporated, constituted in law a *person* capable of receiving any grants of real or personal property, which might be made to it for the purposes for which it was incorporated, especially a donation by the city of Louisville sanctioned by the legislature. City of Louisville *v.* University of Louisville, 15 B. Mon. (Ky.) 642.

[3] In an old case this talk is found, where the question concerned the legality of the removal of a burgess: "They say he was removed in *common council*, which is but a part of the corporation; but that was soon overruled, for Holt said, the power is laid in the mayor and burgesses to remove, and it cannot be worse for being done in common council. Northy: But the common council is a distinct body. Holt: It may be not." Rex *v.* Chalk, Comb. 396.

for the conveniences of legal procedure, the aggregate body of shareholders in a joint-stock company should be deemed the corporation. This is the view which the English courts appear to be now taking of the registered joint-stock companies of that country, formed under recent statutes, which do not differ in substance from American corporations. Those courts have, accordingly, held that fraudulent and *ultra vires* acts of the directors of a company, assented to by the members in general meeting, became the acts of the company itself. And, as we shall see hereafter,[1] the individual stockholder is for many purposes of substantial justice deemed to be, not a stranger to the corporation, but in privity with it. But, by a fiction of law, resorted to chiefly for the convenient administration of justice, the corporation is deemed to be one person, whilst the stockholders — even the whole of them taken collectively — are other persons.

§ 18. **Illustrations of this Distinction.**— A private business corporation, at the annual meeting, if there be no restriction in the charter or by-laws, may transact any business incident to the corporate interests.[2] But in its dealings with third persons, its acts can only assume legal form when done by the hand of its appropriate agents. Thus, a corporation can convey its lands only by deed, executed by its agent, legally authorized thereunto by vote of the corporation, and reciting the vote conferring the power to convey; the shareholders, as such, cannot convey the real estate of the corporation, although they all join in the deed;[3] though effect might be given to such a deed in equity. This distinction is also well illustrated and discussed by Lord Langdale, M. R., in a case where all the corporators, four in number, by mutual assent, divided the capital stock of the corporation among themselves without fully paying for it, and the corporation afterwards sustained a bill in equity against them to recover the deficiency.[4]

§ 19. **Sense in which the State may be a Corporation.** — It is obvious that a State of the Union may, for some purposes, be regarded as a corporation. "It is a legal being, capable of

[1] *Post*, § 1082.

[2] Warner *v.* Mower, 11 Vt. 385.

[3] Wheelock *v.* Moulton, 15 Vt. 519; *post*, §§ 1075, 3740.

[4] Society of Practical Knowledge *v.* Abbott, 2 Beav. 559.

transacting some kinds of business like a natural person, and such a being is a corporation." [1] A State is not, however, included in the term "corporation," as used in the *internal revenue acts* of Congress. Therefore, the income derived from a railroad, owned and managed by the State of Georgia, was not liable to taxation.[2]

§ 20. **Quasi-Corporations.** — Distinctions have been taken between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent. These latter have been called *quasi*-corporations. They include counties, towns, parishes, school districts, etc.[3] Thus, it has been held that *towns* in New York are corporations, as far as corporate powers are granted, or are incidental to express grants.[4] In like manner *school districts*, in some of the New England States, are regarded as *quasi*-corporations,[5] and may be sued as such without any express statute giving the right of action.[6] In a celebrated case in Pennsylvania, in which the character of the General Assembly of the Presbyterian church was called in question, some of the features of a *quasi*-corporation were pointed out by Chief Justice Gibson. He said that the Assembly had no feature of such a corporation. "A *quasi*-corporation has capacity to sue and be sued as an artificial person, which the assembly has not. It is also established by law, which the assembly is not. Neither is the Assembly a particular order or rank in the corporation, though the latter was created for its convenience, — such, for instance, as the shareholders of a bank or joint-stock company, who are an integrant part of the body. It is a segregated association, which, though it is the

[1] State of Indiana *v.* Woram, 6 Hill (N. Y.), 33 (1843); *s. c.* 40 Am. Dec. 378, per Bronson, J. See also People *v.* Assessors of Watertown, 1 Hill (N. Y.), 620.

[2] Georgia *v.* Atkins, 35 Ga. 315.

[3] Riddle *v.* Proprietors of Locks, &c., 7 Mass. 187; School District in Rumford *v.* Wood, 13 Mass. 198; Damon *v.* Granby, 2 Pick. (Mass.) 352; Adams *v.* Wiscasset Bank, 1 Me. 363; Mower *v.* Leicester, 9 Mass. 250.

[4] North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

[5] Gaskill *v.* Dudley, 6 Met. (Mass.) 546 (1843); *s. c.* 39 Am. Dec. 750; Andrews *v.* Estes, 11 Me. 267 (1834); *s. c.* 26 Am. Dec. 521.

[6] McLoud *v.* Selby, 10 Conn. 390 (1835); *s. c.* 27 Am. Dec. 689.

productive organ of corporate succession, is not itself a member of the body, and in that respect it is anomalous. Having no corporate quality in itself, it is not a subject of our corrective jurisdiction, or of our scrutiny, further than to ascertain how far its organic structure may bear on the question of its personal identity or individuality." [1]

§ **21. Official Boards of Municipal Corporations.** — In the machinery of municipal government, the legislatures of the States have frequently had occasion to create boards of officers for the performance of particular duties. These boards are not in general corporations, but are agencies of the municipal corporation in the sense which makes the latter liable for their contracts and torts. Thus, the water commissioners of the city of New York, who possessed about the same powers and were charged with about the same duties in relation to the construction of works for supplying the city of New York with water, as those possessed by the canal commissioners in that State in the construction of State canals, were held not to be a corporation nor liable to be proceeded against as such. If they had contracted as public officers within the scope of their powers, the remedy on the contract was against the city of New York.[2] On the other hand, such a board may be a corporation, if such is the will of the legislature, as manifested by the statute creating it. Such, for instance, is the board of public schools of the city of St. Louis.[3]

§ **22. Kinds of Corporations.** — In the English law corporations are divided into *ecclesiastical* and *lay;* and lay corporations are again divided into *eleemosynary* and *civil.*[4] It is doubtful how far clear conceptions of the law are promoted by keeping in mind these divisions. They seem, for us at least, to have an historical, rather than a practical value. In a country where the

[1] Com. *v.* Green, 4 Whart. (Pa.) 531, 598. A *fire-engine* company has been regarded as a *quasi*-corporation. Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202.

[2] Appleton *v.* Water Commissioners, 2 Hill (N. Y.), 432.

[3] Heller *v.* Stremmel, 52 Mo. 309, where it was held that this board was not a municipal corporation.

[4] 2 Kent Com. 274; 1 Bla. Com. 471; 1 Kyd Corp. 25, 27.

church is totally dissociated from the state, there is little room for a division of corporations into ecclesiastical and lay; and while charitable corporations have many features which distinguish them from other private corporations, as will hereafter appear, it is very seldom that the word "civil" is used in our American books of reports in order to distinguish corporations other than charitable. A more practical conception of the subject, and one more in consonance with the state of our laws and institutions, has divided corporations into these three general classes: *public municipal* corporations, the object of which is to promote the public interests; corporations technically private, but of *quasi-public* character, having in view some public enterprise in which the public interests are involved, such as railroad, turnpike and canal companies; and corporations strictly *private*.[1] Each of these divisions is capable of several subdivisions, having reference chiefly to the *purposes* for which corporations may be organized.

§ **23. The Definition given by Chancellor Kent.** — "Public corporations," according to Kent, "are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the legislature of the State. They may also be empowered to take or hold private property for public uses; and such property is invested with the security of other private rights. So, corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property. If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation. So, a hospital created and endowed by the government, for general purposes, is a public and not a private charity. But a bank whose stock is owned by private persons, is a private corporation, though its object and operations partake of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike and railroad

[1] Miner's Ditch Co. *v.* Zellerbach, 37 Cal. 543.

companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person. A hospital founded by a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner, is a private charity, though from its general and beneficent objects it may acquire the character of a public institution. If the uses of an eleemosynary corporation be for general charity, yet such purposes will not of themselves constitute it a public corporation. Every charity which is extensive in its object may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private to a public one. The charter of the Crown, said Lord Hardwicke, can not make the charity more or less public, but only more permanent. It is the extensiveness of the object that constitutes it a public charity. A charity may be public, though administered by a private corporation. A devise to the poor of a parish is a public charity. The charity of almost every hospital and college is public, while the corporations are private. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke."[1]

§ 24. **Public and Private Corporations.**— Perhaps the most general division of corporations is into *public* and *private*. In this work it is proposed to treat only those of the latter class. A public corporation is said to be one which cannot carry out the purposes of its organization without chartered rights from the commonwealth.[2] On the other hand, it is said that a mere private corporation needs no franchise from the State in order to carry on its business.[3] These definitions are not satisfactory. A railway company, as hereafter seen, is regarded for most purposes as a private corporation, and yet it could not build its road without the aid of the power of eminent domain, which is an incident of sovereign power and must be conferred by the State.[4] Public corporations have been said to be such as are created for

[1] 2 Kent Com. 275, 276.

[2] Allegheny County *v.* McKeesport Diamond Market, 123 Pa. St. 164; *s. c.* 46 Phila. Leg. Int. 212; 19 Pitts. L. J. (N. S.) 280; 23 W. N. C. 89; 16 Atl. 619.

[3] Pittsburgh's Appeal, 123 Pa. St. 374; 46 Phila. Leg. Int. 211; 19 Pitts. L. J. (N. S.) 282; 23 W. N. C. 91; 16 Atl. 621.

[4] *Post,* Ch. 122.

political purposes, with powers to be exercised for the public good.[1] This statement is another illustration of the difficulty of conveying an exact idea of a complicated subject by a definition couched in few words. There are many corporations created for political purposes, which are not public corporations,— such, for instance, as the Tammany Society in New York. It is easy to understand that corporations created for governmental purposes, to which the legislature delegates a limited portion of its governmental powers, are to be regarded as public corporations. The most usual illustration of this is furnished by the case of *municipal* corporations, — those incorporated cities and towns to which the legislature delegates a portion of the police power of the State, to be exercised within certain prescribed territorial limits. Equally unsatisfactory is the statement that a corporation is private, as distinguished from public, unless the *whole interest* belongs to the government, or the corporation is created for the administration of political or municipal power.[2] In the line of this theory it has been observed: "A corporation is public when it has for its object the government of a portion of the State; and although in such a case it involves some private interests, yet as it is endowed with some portion of political power, the term *public* has been deemed appropriate. Another class of *public* corporations are those which are founded for public — although not political or municipal — purposes, and the whole interest in which belongs to the government. Thus, a bank, organized by the government for public purposes, is a public corporation, if the whole of the stock and all interest in it reside in the government." [3] But this was inaccurate; for corporations may exist for purposes public in their nature in which the whole interest belongs to the State, which will yet be re-

[1] Tinsman *v.* Belvidere &c. R. Co., 26 N. J. L. 148.

[2] Rundle *v.* Delaware &c. Canal, Wall. Jr. (U. S.) 275. The Board of Public Schools of St. Louis is undoubtedly a public corporation; but it has been held that it is not a municipal corporation because it does not exercise any political or governmental power. Heller *v.* Stremmel, 52 Mo. 309. A *private* corporation may have charge of an interest of so public a concern as to render its charter a *public act,* and such an act was the Indiana act of 1838, relating to the Vincennes University. State *v.* Trustees of the Vincennes University, 5 Ind. 77.

[3] Cleaveland *v.* Stewart, 3 Ga. 283, 291.

garded as private corporations. Thus, it was held that the bank of the State of South Carolina, though wholly owned by the State, had only the same powers and privileges as other corporations, and therefore could claim no priority on the ground that a debt due to the bank was a debt due to the State.[1] The former State bank of North Carolina was also regarded as a private corporation, though the several acts by which such a bank in North Carolina was created and its powers, duties and duration defined, were declared public acts.[2] So, it was held that the former State bank of Alabama was a private corporation, not invested with the attributes of sovereignty, and that, where it had a claim against the estate of a deceased person, it must present it within the period of limitation prescribed for any private creditor, or be forever barred. The court said: "It cannot be endured, that the legislature, which is but the mere machinery of government, should be allowed to confer upon a moneyed corporation, established by itself, any portion of the sovereign power, which was inherent in the body politic."[3] These cases proceed upon the view expressed by the Supreme Court of the United States, speaking with reference to the Planters' Bank of Georgia, — "that the State does not, by becoming a corporation, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it."[4] They proceed upon the further principle, stated by the same court, that "when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."[5]

§ 25. **Public School Corporations.** — Where the State pursues the policy of maintaining at the public charge a system of

[1] Bank &c. *v.* Gibbs, 3 McCord (S. C.), 377.

[2] State Bank *v.* Clark, 1 Hawks (N. C.), 36. And see *ante*, § 23.

[3] Bank *v.* Gibson, 6 Ala. 814, 816.

[4] United States *v.* Planters' Bank, 9 Wheat. (U. S.) 907.

[5] *Ibid.* See also Bank of Kentucky *v.* Wister, 2 Pet. (U. S.) 318. The Supreme Court of North Carolina has advanced the untenable view that a bank which issues bills for circulation as money is a public corporation; but that a bank which, beyond a power to contract in its corporate name, has no powers beyond those which every other person possesses, must be deemed a private corporation. State *v.* Simonton, 78 N. C. 57.

education, consisting of common schools, seminaries, colleges or universities, the corporations through the agency of which this is done are generally regarded as *public* corporations, whether created by general or special laws. Thus, it has been held that a board of school commissioners for a particular county, created by special act of the legislature, authorized to devise a system of public instruction for such county, to establish public schools therein, and to raise money for the support of the same, etc., is a *public* corporation, created for great public educational purposes, and the charter, being public in its character, may be altered and amended at the will and pleasure of the general assembly.[1] So, it is held in Illinois that the trustees of schools are public corporations, and, as such, subject to be controlled and regulated by the legislature.[2] So, the trustees of the University of Alabama compose a public corporation, entirely within the control of the legislature, so that the latter has the authority, by the passage of any statute, to alter, amend, or enlarge the original acts of incorporation.[3] On grounds equally obvious, a *school district* township is a "political or municipal corporation," within the meaning of a constitutional provision,[4] inhibiting such corporations from incurring indebtedness exceeding five per cent. on the taxable property of the corporation.[5] On the other hand, upon grounds not made obvious by the court, an incorporated *academy* in Georgia was held to be a *private* corporation, notwithstanding it derived its support in part from the State.[6]

1 School Commissioners *v.* Putnam, 44 Ala. 506.

2 Bradley *v.* Case, 3 Scam. (Ill.) 585; Bush *v.* Shipman, 4 Scam. (Ill.) 186; Trustees *v.* Tatman, 13 Ill. 28; Compare State *v.* Springfield Township, 6 Ind. 83.

3 Trustees *v.* Winston, 5 Stew. & Port. (Ala.) 17. So of the Agricultural College of Florida: State *v.* Knowles, 16 Fla. 577. So of the University of Missouri: Head *v.* Curators, 47 Mo. 220. So of the University of North Carolina: University *v.* Maultsby, 8 Ired. Eq. (N. C.) 257. But the University of Iowa cannot be sued as a corporation; persons aggrieved by the official acts of its officers can only apply to the legislature: Weary *v.* State University, 42 Iowa, 335. Compare Bracken *v.* William & Mary College, 1 Call (Va.), 161; *s. c.* 3 Call (Va.), 573; Louisville *v.* Louisville University, 15 B. Monr. (Ky.) 642.

4 Iowa Const., art. 2, § 3.

5 Winspear *v.* Holman, 37 Iowa, 542.

6 Cleaveland *v.* Stewart, 3 Ga. 283.

§ 26. Corporations to Promote Charities of Public Nature. — The fact that a charity which a corporation is chartered to foster is a charity of a public nature, that is, a charity intended for the benefit of all the members of the public, of a designated class, who may apply for or be entitled to the benefaction, does not make the corporation a public corporation. Thus, where a college was endowed by private individuals the fact that its objects were of a public nature did not give the corporation the quality of a public corporation, so as to subject it to governmental control, — the trustees and professors not being public officers, invested with any portion of the political power of the State, and the institution not partaking in any degree in the administration of civil government, or performing any of the duties which flow from the sovereign authority.[1] In other words, an eleemosynary corporation upon a *private foundation* is a *private* and not a public corporation, in the sense that it is not subject to regulation by the State contrary to its charter.[2] But it has been held that a corporation, the object of which is to provide a general hospital for sick and insane persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without the expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, — is a *public* charitable institution in the sense that it is not liable for the *negligence* of a surgeon selected by its trustees with due care; and this although patients are required to pay for their board, according to their circumstances and the accommodations which they receive.[3]

[1] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 634.

[2] *Ibid.* 671, per Story, J. "Who ever thought before," said the learned justice, "that the munificent gifts of private donors for general charity became instantaneously the property of the government, and that the trustees appointed by the donors, whether corporate or unincorporated, might be compelled to yield up their rights to whomsoever the government might appoint to administer them? If we were to establish such a principle, it would extinguish all future eleemosynary endowments, and we should find as little of public policy as we now find of law to sustain it." *Ibid.* 672. To the same effect see Allen *v.* McKeen, 1 Sumn. (U. S.) 276; State *v.* Adams, 44 Mo. 570.

[3] McDonald *v.* Massachusetts Hos-

§ 27. Corporations formed to Promote Public Objects for Private Gain.—Recurring to the principle[1] that corporations are not public because they are formed to promote objects of a public character,[2] we find that corporations which are formed primarily for the private emolument of their members, do not become public corporations from the mere fact that the employment from which they expect to derive such emolument is public in its nature;[3] though they may possess some of the powers and be subject to some of the liabilities of public corporations. Thus, a *canal company* is none the less a private corporation, from the fact that its canal is constructed for the public benefit.[4] So, a *railway company*, although equally with a canal company, it may receive by delegation from the State the power of eminent domain, which is strictly a sovereign power,[5] and may, on the other hand, be subject to the police regulation of the State in the conduct of its business within certain constitutional limits,[6]—is yet regarded for most purposes as a private corporation.[7] So, although the business of *banking* is subject to the police supervision of the State, yet a bank whose stock is owned by private persons is a private corporation, in the sense that the legislature cannot control or alter the grant without the consent of the corporators.[8] So, where the objects of the creation of a corporation were not declared in the statute creating it, other than to superintend the construction of a *levee* on a certain river, but it appeared that its purpose was to advance the private interests of land-owners within the district incorporated, and that no

pital, 120 Mass. 433; *s. c.* 21 Am. Rep. 529. The Board of Education of the State of Illinois (Act Feb. 18, 1857, L. 1857, p. 298), is an *eleemosynary*, and not a public corporation. Board of Education *v.* Bakewell, 122 Ill. 339.

[1] *Ante*, § 26.

[2] Tinsman *v.* Belvidere &c. R. Co., 26 N. J. L. 148; Directors *v.* Houston, 71 Ill. 318.

[3] Tinsman *v.* Belvidere &c. R. Co., 26 N. J. L. 148; Whiting *v.* Sheboygan &c. R. Co., 25 Wis. 167.

[4] Ten Eyck *v.* Delaware &c. Canal, 18 N. J. L. 200.

[5] *Post*, Ch. 122.

[6] *Post*, Chs. 118, 119.

[7] Tinsman *v.* Belvidere &c. R. Co., 26 N. J. L. 148. They are such within the rule that their charters are protected by the constitution of the United States from legislative alteration. Thorpe *v.* Rutland &c. R. Co., 27 Vt. 140; *s. c.* 62 Am. Dec. 625, and note; Beach on Railways, § 23.

[8] Logwood *v.* Huntsville Bank, Minor (Ala.), 23; State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30.

other purposes were embraced in its provisions, although it might accidentally enhance the general prosperity of the whole community,— yet it was held to be none the less a private corporation, in the sense that the legislature had no constitutional power to clothe it with the power of taxation.[1]

§ 28. **When Municipal Corporations deemed Private.** — A class of decisions exist, chiefly in New York, which proceed upon the ground that a municipal corporation may have a *private character*, that is, may own certain kinds of property in a private capacity, as to which it is to be deemed a private corporation and subject to the liabilities of a private proprietor. The leading case on the subject is *Bailey* v. *New York*.[2] The principle there declared was that a municipal corporation is liable to pay damages for injuries inflicted in the management of property which it holds in its private or corporate capacity, the profits of which inure directly to its benefit as a corporation, and indirectly to the benefit of the public, — in the same manner as an individual is so liable. A dam erected by a city for supplying its inhabitants with water, for which the city received compensation distributively, from the inhabitants thus supplied, was deemed private or corporate property within the meaning of this rule.[3] Under this rule a city has been held liable for an injury sustained by the plaintiff in falling into a dangerous excavation on the grounds of a city building, used in part for municipal purposes and in part *rented* to private persons; [4] for the sinking of a vessel in consequence of the city negligently permitting an iron cylinder to remain concealed under water near one of its wharves; [5] for the loss of a horse arising from the non-repair of a *wharf* for the use of which it receives tolls; [6] and for the negligence of persons employed by the officers of the corporation in

[1] Directors &c. *v.* Houston, 71 Ill. 318. That the power of *taxation* cannot, under the constitution of Illinois, be bestowed upon private persons or private corporations, see Harward *v.* St. Clair &c. Drainage Co., 51 Ill. 130; South Park Commissioners *v.* Salomon, 51 Ill. 37.

[2] 3 Hill (N. Y.), 531, and 2 Denio (N. Y.), 433; *s. c.* 2 Thomp. Neg. 652.

[3] *Ibid.*

[4] Oliver *v.* Worcester, 102 Mass. 489.

[5] Memphis *v.* Kimbrough, 12 Heisk. (Tenn.) 133.

[6] Macauley *v.* New York, 67 N. Y. 602.

the repair of its public *sewers*.[1] This rule in its operation creates a marked exception to the general rule that no action lies against a municipal corporation for damages sustained in consequence of its neglect to perform a *public duty*.[2]

§ 29. **Illustrations of Public and Private Corporations.**—*Overseers of the poor* in New York are held to be a *public* corporation for certain purposes.[3] - - - - *Trustees of the poor* in Mississippi have been held to be a public corporation, and subject to the control of the legislature; so that a statute giving a stay of execution on a judgment recovered by such corporation was not unconstitutional.[4] - - - - *Overseers of the poor* in Boston were held to be a corporation aggregate under a statute giving them many powers usually incident to a corporation, although they were chosen annually by the inhabitants of the town.[5] - - - - In Illinois, the *commissioners* created under an act of the legislature for laying out and maintaining a suburban *park* are a *public* corporation, in the sense which gives the legislature the right to modify their powers and duties, without submitting the supplemental act to a popular vote.[6] - - - There is judicial authority to the effect that a corporation created for the purpose of improving the *navigation* of a river, so as to make it suitable for driving logs, is a *public* corporation; since such a river is a public highway, and since the power of taking tolls, vested in it by its charter, is itself a governmental power.[7] - - - - A *levee district*, organized under the laws of California, to construct works for preventing portions of the territory from overflow, and clothed with powers for this purpose, to issue bonds, levy and collect assessments, construct and repair highways, open canals, etc., is a *public* corporation.[8] - - - - A *bank* in which the stock is owned by individuals is a *private* corporation.[9] - - - - A *private banker*, though carrying on business under

1 Lloyd *v.* New York, 5 N. Y. 369.

2 Sussex County *v.* Strader, 18 N. J. L. 108; Cooley *v.* Essex, 27 N. J. L. 415; Livermore *v.* Camden, 31 N. J. L. 507; *s. c.* 29 N. J. L. 245; Pray *v.* Jersey City, 32 N. J. L. 395; Union *v.* Durkes, 38 N. J. L. 21; Richmond *v.* Long, 17 Gratt. (Va.) 375. For a further discussion of this distinction, with illustrations, see 2 Thomp. Neg. 734; Darlington *v.* New York, 31 N. Y. 164, 198.

3 Rouse *v.* Moore, 18 Johns. (N. Y.) 407; *s. c.* 1 Cow. (N. Y.) 861.

4 Governor *v.* Gridley, 1 (Walk.) Miss. 328.

5 Overseers of the Poor of Boston *v.* Sears, 22 Pick. (Mass.) 122.

6 Andrews *v.* People, 83 Ill. 529; Andrews *v.* People, 84 Ill. 28.

7 Bennett's Branch Improvement Company's Appeal, 65 Pa. St. 242.

8 Dean *v.* Davis, 51 Cal. 406. See also People *v.* Williams, 56 Cal. 647.

9 Miners' Bank *v.* United States, 1 Greene (Iowa), 553.

the New York Act of 1838, was not a corporation at all.[1] - - - - A corporation constituted for the purpose of improving a special breed of cattle, and keeping, preparing, publishing and supplying a herd-book thereof, and for promoting the "interest of the importers, breeders and owners of said cattle, and thereby the public generally," is neither a public nor a *quasi*-public corporation, but a *private* one; and hence *mandamus* will not lie to compel it to admit an importer of such cattle to membership, or to register his cattle, even though by not being so registered their value is diminished one-half.[2]

[1] Cayler *v*. Sanford, 8 Barb. (N. Y.) 225; Hallett *v*. Harrower, 33 *Id*. 537; Codd *v*. Rathbone, 19 N. Y. 37.

[2] People *v*. Holstein-Friesian Assoc., 48 N. Y. Supm. (41 Hun) 439; 3 N. Y. St. Rep'r 142.

CHAPTER II.

CREATION BY SPECIAL CHARTERS.

§ 35. Corporations are Created by Legislative Power. — Nothing less than sovereign power can create a corporation. One corporation cannot create another. It was held that the city of London could not create a corporation, though they might create a *guild* or *fraternity*, which was something in the nature of a social *club*.[1] In England corporations were formerly created, in most instances, by royal charter. They are now generally created in that country by, or under the authority of acts of Parliament. In this country they are created by authority of the legislature, and not otherwise.[2] Companies or societies which are not expressly sanctioned by the legislature in the form of some general or special law, are, in respect of third

[1] Robinson *v.* Groscot, Comb. 372. "A corporation can only be created and exist by sanction of the legislature." Morton, J., in Hoadley *v.* County Commissioners, 105 Mass. 526. A corporation cannot be constituted by the mere agreement of parties; it can only be created by legislative enactment. Stowe *v.* Flagg, 72 Ill. 397.

[2] Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

parties, generally regarded as no more than ordinary *partnerships;*[1] though, as among their own members, the rights and obligations created by their private statutes, not opposed to public policy or to express law, may be different from those of partners.[2]

§ **36. To what Extent this Power may be Delegated.** — In the absence of constitutional restraints, no reason is perceived for holding that the legislature can not delegate to subordinate agencies the power of creating corporations, — prescribing the manner in which the power shall be exercised. In several of the States the power of approving the charters of corporations formed for certain ideal purposes is vested in the judicial courts.[3] It has been pointed out that in England the king might grant a general power to create corporations, and that a similar power has been delegated by the legislature of Pennsylvania to the judicial courts.[4] The chancellor of the university of Oxford had the power by charter to erect corporations.[5] But Columbia College, in the State of New York, although created by royal charter under the name of King's College, has been adjudged to have no such power. The court, speaking through Bronson, C. J., said: "Although it is now settled that the king may delegate his authority to create corporations, or, in other words, may exercise the power by another as his instrument, on the principle, *qui facit per alium facit per se*, I find no authority for the position that a general power to erect corporations has ever been delegated to either of the English universities. But however that may be, I think there is no color for saying that such a power has been conferred upon any of our colleges."[6] The power which is able to prescribe the *formalities* to be observed in order to create a corporation, may of course dispense with them.[7] In the

1 Wells *v.* Gates, 18 Barb. (N. Y.) 554; *post*, § 2969.

2 *Post*, § 940.

3 *Post*, § 110. *et seq.*

4 Observations in Franklin Bridge Co. *v.* Wood, 14 Ga. 80; *post*, § .

5 1 Kyd Corp. 50; 1 Bla. Com. 474.

6 Medical Institution *v.* Patterson, 1 Denio (N. Y.), 61, 68. The point adjudged was that the so-called "statutes of the trustees of Geneva College for the formation of a medical faculty thereof, to be denominated the medical institution of Geneva College," did not create that body a corporation.

7 Black River &c. R. Co. *v.* Barnard, 31 Barb. (N. Y.) 258.

United States the power of creating corporations has been generally, perhaps universally, exercised by the legislatures of the States respectively; by the Congress of the United States within the sphere of its powers; and by the legislatures of the territories which have been organized under acts of Congress.[1] Before the revolution, charters of incorporation were granted by the proprietors of Pennsylvania under a derivative authority from the crown, and those charters have been since recognized as valid.[2]

§ 37. Exercised by Judicial or Ministerial Action under General Laws. — Corporations are now more generally created by judicial or ministerial action under general laws.[3] When the legislature has, by a general law, prescribed the conditions upon which a corporation may be created, it is no objection to the validity of such law, that *ministerial duties*, such as the issuing of a certificate of incorporation, are left to be performed by some officer, such as the Secretary of State, before the incorporation takes effect.[4] In many of the States, subordinate administra-

[1] It has been held that an act of Congress creating a *territory*, establishing a *legislature* for such territory, and vesting it with power to make all laws which it might deem conducive to the good government of the inhabitants of such territory, the right being reserved by Congress to disapprove and thereby revoke any law passed by such legislature, empowered such legislature to create corporations, subject to revocation by Congress. It was so held concerning the territory of Missouri. Riddick *v.* Amelin, 1 Mo. 8; Douglas *v.* Bank of Missouri, *Id.* 20. Under the first constitution of Missouri the General Assembly of that State had power, not expressly granted but necessarily implied, to incorporate cities and towns, and to invest them with authority to legislate with regard to matters of local police. State *v.* Simonds, 3 Mo. 414. See also Ruggles *v.* County of Washington, 3 Mo. 348.

[2] 3 Wils. Lect. 409, as cited in Franklin Bridge Co. *v.* Wood, 14 Ga. 84.

[3] *Post*, §§ 110, 132.

[4] Granby Mining &c. Co. *v.* Richards, 95 Mo. 106, 112. In this case the following observation of a recent writer of reputation is quoted with approval: "A general power to confer corporate franchises can not be delegated by the legislature to any other agent. However, where the legislature has enacted that a corporation may be formed upon compliance with certain conditions, it is no objection that ministerial duties, such as the issuing of a certificate or charter, must be performed by some officer before the incorporation takes effect." 1 Mor. Priv. Corp., § 15. Charters, or articles of corporate association, are also, in some States, submitted to the judicial courts for approval (*Post*, § 110); in others they are submitted to the court, but the court is deemed

tive boards charged with the management of local municipal affairs have received, by delegation from the legislature, the power to grant *franchises* such as are usually granted by the legislature to corporations. An instance of this is afforded by the legislation of California. In that State a franchise to collect tolls on roads, &c., granted by a subordinate body under authority delegated by law, is a grant emanating from the sovereign authority of the State. Such a grant by a board of supervisors has the same standing in respect to its validity, the presumptions in its favor and the mode in which it may be attacked, as any other grant made by any department of the government. It cannot be attacked by a private person, or in a collateral proceeding, for mere error in the exercise of the authority to make the grant.[1]

§ 38. **To what Extent exempt from Judicial Review.** — The power of creating corporations, thus possessed by the legislatures of the States and Territories, and, within its constitutional sphere of action, by the Congress of the United States, is obviously a power which, like any other subject of legislative discretion, is not subject to judicial review,[2] except on constitutional grounds. The departments of our national and State governments being independent of each other, it necessarily follows that each department must give full faith and credit to the acts of the others, and that it is not competent for a judicial court to investigate the question whether an act creating a corporation has been *fraudulently obtained*,[3] or obtained in consequence of fraudulent or improper practices on the part of some of the members of the legislature concerned in passing it.[4]

§ 39. **Corporation need not be Declared such in Express Words.** — It is not necessary to the conclusion that a body ex-

to exercise the mere ministerial function of recording them and of giving publicity to the fact of incorporation. *Post*, § 110.

[1] Truckee &c. Turnpike Co. *v.* Campbell, 44 Cal. 89.

[2] United States Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

[3] Clarke *v.* Brooklyn Bank, 1 Edw. Ch. (N. Y.) 361. The charter of a railroad company can not be attacked collaterally for bad faith in obtaining it. Garrett *v.* Dillsburgh &c. R. Co., 78 Pa. St. 465.

[4] Ferguson *v.* Miners' &c. Bank, 3 Sneed (Tenn.), 609.

ercising corporate powers is in the rightful exercise of them, that the body should have been declared a corporation by the legislature, in express words.[1] As hereafter seen, a corporation may exist by legislative *recognition;*[2] and, for stronger reasons, where there is a statute conferring on an existing collective body powers which are appropriate to a corporation alone, it is a sound conclusion that this makes it a corporation.[3] Thus, there were no statutes to be found in which the original proprietors of *townships* in New Hampshire were expressly declared to be corporations; but there were several statutes prescribing the method of calling their meetings, authorizing them to choose officers, to make assessments upon the proprietors, to appoint collectors, etc.,[4] and there were other statutes giving them power to sue and be sued. These, it was held, made them corporations.[5] So, a *grant of lands* to individuals, by the sovereign authority of a State, to be possessed and enjoyed by them in a corporate character, in itself confers a capacity to take and hold in that character.[6] So, an act authorizing the sale of State *canals*, and providing that the grantees "shall hold and enjoy the same, together with all the rights, privileges, and franchises of their grantors" (who were an incorporated company) "and under such corporate name as the said grantees may adopt," has been held to invest an association of individuals, purchasing the property, with corporate powers.[7] So, an act of the legislature which requires the supervisors of a county, upon the petition of persons in the possession of more than one-half of the acres of any specified portion of the county, to erect such specified portion into a *levee district*, for the purpose of reclaiming the same from overflow, and then provides the details by which the reclamation shall be

[1] Denton *v.* Jackson, 2 Johns. Ch. (N. Y.) 324.

[2] *Post*, § 318.

[3] Com. *v.* West Chester Co., 3 Grant Cas. (Pa.) 200.

[4] Colburn *v.* Ellenwood, 4 N. H. 101.

[5] Atkinson *v.* Bemis, 11 N. H. 44. They might, therefore, convey or make partition of their undivided lands, by deed or by a vote of the proprietors. *Ibid.;* Colburn *v.* Ellenwood, *supra;* Adams *v.* Frothingham, 3 Mass. 352; Springfield *v.* Miller, 12 Mass. 415. It followed that a copy of such vote from their records was, *prima facie*, record of title against them and also against any one who should enter as a mere trespasser, claiming no title. Atkinson *v.* Bemis, *supra*.

[6] North Hempstead *v.* Hempstead, 2 Wend. (N. Y.) 109.

[7] Delaware &c. Canal Co. *v.* Commonwealth, 50 Pa. St. 399.

effected, makes a levee district, so organized by the supervisors, a corporation, and a public corporation, even if the act does not in terms declare it a corporation.[1] So, although an act for the formation of plank road and turnpike companies denominated the companies which might be formed under its provisions as "joint-stock companies," they were nevertheless held to be corporations; since it appeared that the powers, rights and liabilities which the legislature had annexed to them were similar to those possessed by corporations.[2] On the other hand, words establishing or recognizing the existence of an organized body of persons, but without attributing to them any powers necessary to corporations, do not make them a corporation. Thus, a resolution of the Executive Council of the Commonwealth of Massachusetts which ran thus: "Advised, that a company of artillery be established by Watertown, agreeable to military law," did not make the company so established a corporation.[3]

§ **40. Theories as to when Charters take Effect.** — It is not necessary that a legislative act, granting franchises to a corporation or corporations, should in form extend the grant to a person or persons *in esse*. On the contrary, the grant may be extended to any members of the public possessing the qualifications prescribed in the grant, who will organize the corporation in com-

[1] Dean *v.* Davis, 51 Cal. 406. In seeming opposition to the principle of the text, the Supreme Court of Ohio has ruled that a statute of that State "regulating the *Commercial College of Cincinnati*," did not constitute the board of trustees therein provided for, a corporation, nor confer any additional corporate power on the city of Cincinnati. State *v.* Davis, 23 Ohio St. 434. The same court has held that a statute of that State "to establish and maintain an *agricultural college* in Ohio," which created a board of trustees to be appointed by the governor, committed to such board the government of the institution, and authorized them to make contracts and maintain actions for its benefit, and to exercise other powers similar to those conferred on bodies corporate, — did not constitute such board a corporation, because it did not assume to do so. Neil *v.* Board of Trustees, 31 Ohio St. 15, 21. The decision seems to be unsound, and contrary to views expressed by the Supreme Judicial Court of Massachusetts and by the Supreme Court of the United States. *Ante*, §§ 3-6. The Ohio court was, however, endeavoring to uphold the validity of the act, in view of the constitutional inhibition against creating corporations by special laws.

[2] Blanchard *v.* Kaull, 44 Cal. 440. *Ante*, §§ 3-6.

[3] Shelton *v.* Banks, 10 Gray (Mass.), 401.

pliance with the terms of the grant.[1] This is illustrated by the every-day occurrence of the organization of corporations under general laws. Such statutes are merely permissive to the public generally, and are not in the nature of a grant to particular individuals. But when particular individuals avail themselves of the privilege thereby extended to the public, and organize themselves into an association in conformity with the statute, they become a corporation, and the statute becomes their charter.[2] Moreover, when a special charter is granted, and the corporation is to be brought into existence by some future acts of the corporators, the franchises which the charter grants to the body remain in abeyance until such acts are done; and when the corporation is brought into life, the franchises attach.[3] But, for the purpose of saving the rights conferred by special charters and preventing the implication of a repeal by a subsequent constitutional prohibition of such charters, it has been held that, where the legislature incorporates a body of adventurers by a special act, the corporation springs into existence "*ipso facto et eo instanti*."[4] Again, although the governing statute may provide that no act of incorporation hereafter granted, with certain exceptions, shall take effect until the persons therein incorporated have paid into the treasury a certain sum of money, the failure to pay this sum of money will not prevent the associates from becoming a corporation *de facto*. Third persons cannot take advantage of the non-payment of the money; it is a question which can alone be raised by the State.[5]

§ 41. Creation by Reference to another Act. — An act creating a corporation and conferring upon it all the rights and advantages which, in preceding portions of the same act, were

[1] Falconer *v.* Campbell, 2 McLean (U. S.), 195; *s. c.* 10 Myer Fed. Dec., § 10 (in substance).

[2] O'Brien *v.* Cummings, 13 Mo. App. 197.

[3] Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 791.

[4] Little Rock &c. R. Co. *v.* Little Rock, Mississippi River &c. R. Co., 36 Ark. 663, 684. Where the charter declares certain persons named a corporation, this makes it such *ab initio*, and a subsequent requirement of the charter as to the election of directors is merely directory. Stoops *v.* Greensburgh &c. Plank Road Co., 10 Ind. 47. See also Judah *v.* American Live Stock Ins. Co., 4 Ind. 333.

[5] Hughesdale Man. Co. *v.* Vanner, 12 R. I. 491; *post*, § 247.

conferred upon another corporation named, and further declaring that all of the provisions, sections and clauses in the charter of the first named company, not inconsistent with the particular provisions of the charter of the second company, should be fully extended to the president and directors of the latter corporation, is a sufficient charter for such company, in the absence of constitutional restraints upon this mode of legislative action.[1] It is not unusual or objectionable to grant vast corporate powers in a short act, by referring to and adopting provisions of other incorporating acts.[2]

§ **42. Legislative Deviations from the Rules of the Common Law.** — Corporations originating according to the rules of the common law must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred; and where one claims its origin from such source, its rules must be regarded in deciding upon its legal existence. But the legislature have power to create a corporation, not only without conforming to such rules, but in disregard of them; and where a corporation is thus created, its existence, powers, capacities, and the mode of exercising them, must depend upon the law creating it.[3]

§ **43. Who included in the Word "Associates."** — It has been pointed out that, where a charter is granted to certain persons named, and their "associates," the word "associates" may mean those who are already associated with the persons named, or those who may come in afterwards. Speaking upon this question, it was said by Chief Justice Shaw: "If articles of association were drawn up and signed, by which they had agreed to unite in applying for an act of incorporation, and an act should be passed conferring corporate powers on two or three of the first named, and their associates, referring to such articles, — this would make the articles evidence, and make the act apply to

[1] *Post*, §§ 539, 573.

[2] Binghampton Bridge Case, 3 Wall. (U. S.) 78.

[3] Penobscot Boom Corp. *v.* Lamson, 16 Me. 224. The character and purposes of an incorporated institution are to be gathered solely from its charter. Nicholson's Succession, 37 La. An. 346.

all the parties there named, conformably to the maxim, *certum est, quod certum reddi potest.* The question in all such cases is, what the legislature intended; it is a question of the construction of their words. Even if the parties to the enterprise had an understanding between themselves, which was not communicated to the legislature, or not acted upon by them, either in the words of their act, or referred to in it by necessary or reasonable implication, such understanding can not aid in construing the act." [1] In determining this question it is admissible, if necessary, to consider any competent evidence outside the charter, in explanation of the ambiguity.[2] If, upon such evidence, it appears that a charter, granted in terms to several persons therein named and their associates, was in fact granted upon the *joint request* and application of those named, and others associated with them in applying for it, it may reasonably be supposed that the legislature intended to embrace them all within the grant, and that the word "associates" is used to designate those who are not specifically named in the charter. If, however, the evidence discloses the fact that the grantees so named had no actual associates at the time, or if it discloses that the charter was given by the legislature of its own motion, and without solicitation or application from any one, the use of such term in the connection here found may properly be regarded as intended to apply to such persons as may become members of the corporation, upon and after its organization.[3] Where the charter of a bank was granted by the legislature to six persons named, "and their associates," the court heard evidence outside the charter, and determined thereon that the charter could not have been intended to include other persons who did not sign the petition for

[1] Lechmere Bank *v.* Boynton, 11 Cush. (Mass.) 369, 380.

[2] State *v.* Sibley, 25 Minn. 387, 399. "We are not prepared to say that a grant may not be made to certain persons by a certain and definite *description*, as well as by name; and when such words of description are used, it is always competent to go into parol or other evidence *aliunde*, to ascertain the person or thing embraced in the description. Even when a grant is made to one by name, and it turns out that there are two or more persons of the same name, it is in the nature of a latent ambiguity, and evidence *aliunde* is admissible." Shaw, C. J., in Lechmere Bank *v.* Boynton, 11 Cush. (Mass.) 369, 379.

[3] State *v.* Sibley, 25 Minn. 387, 399. As to the effect of a *grant of land* to a person named and his associates, see Duncan *v.* Beard, 2 Nott & McCord (S. C.), 400.

the bank, but who merely subscribed for stock in the same, in sundry books prepared and circulated at the meeting at which the enterprise originated and at which the petition to the legislature was drawn up and signed.[1]

§ 44. How Legislative Grant made and Corporation Organized. — It has been reasoned by Mr. Justice McLean: "The creation of a corporate existence can never take effect until the association be formed and the organization completed. Commissioners are generally designated in the act, who are to superintend the opening of the books and receive subscriptions of stock. And when the amount shall be subscribed, and the necessary payments made, the stockholders elect directors, who appoint a president and cashier. The organization being completed, existence is given to the artificial being, and the agency commences. It is now *in esse*, but before this it was not. Vitality is given to it by the voluntary association and organization of its members. Had they remained passive, the law could have had no effect. In this case, then, the grant of the franchise is not made to a person or persons *in esse*. The commissioners did not constitute the corporation, nor was the franchise, in any form or degree, vested in them. This is the general mode in which corporations are created, and it has stood the test of time and of legal scrutiny. No valid objection is perceived to it. In regard to this objection the act under consideration [a general law authorizing the formation of banking corporations] rests upon the same ground as other and more special acts on the same subject. The franchise is not vested in either until the organization be completed, and this depends upon the voluntary association of individuals. In a special act commissioners are named to open the books and receive subscriptions of stock; in the act under consideration the clerk and treasurer of each county are required to perform this duty. They are commissioners for this purpose. And, so far as the grant is concerned, if it be valid under one law it must be so under the other."[2] If in the organization of a corporation, all the requirements of the charter are observed, although *not in the order prescribed*, the organization is sufficient. Thus, where the charter requires that the directors shall be named in the articles of association, it is sufficient compliance with the requirement that the articles are adopted at the time of electing the directors. And the requirement is only directory.[3]

[1] Lechmere Bank *v.* Boynton, 11 Cush. (Mass.) 369.

[2] Falconer *v.* Campbell, 2 McLean (U. S.), 195; *s. c.* 10 Myer Fed. Dec., § 10.

[3] Eakright *v.* Logansport &c. R. Co., 13 Ind. 404; Covington &c. Plank Road Co. *v.* Moore, 3 Ind. 510.

§ 45. What if the Commissioners Refuse to Act. — If a majority of the commissioners corruptly refuse to proceed to the organization of the corporation, in accordance with the law, it seems that the minority may proceed to execute the power. Such seems to have been the conclusion of the Supreme Court of Pennsylvania in a case where the legislature appointed *nine* commissioners, who, or any three of them, were authorized to organize a bank. A majority of the whole number corruptly agreed to transfer the franchise to a citizen of another State. It was held that, in such case, *three* other of the commissioners had valid authority to proceed with the organization, and that letters-patent, issued in pursuance of such organization, were valid.[1] If it should appear, that commissioners, appointed by an act of the legislature to open books for receiving subscriptions to the capital stock of a bank, have refused, after having accepted their appointment and assumed to act in the premises, to proceed in the execution of the trust confided to them, without sufficient cause for such refusal, and that thereby the act of incorporation may fail of being carried into effect, a court possessing jurisdiction would, upon proper application, issue a writ of *mandamus* to compel the commissioners to perform the services required of them by law. But where the act of incorporation requires, that the books for receiving subscriptions to the capital stock shall be opened under the direction of seven commissioners named, "or a *majority* of them," the majority have full power to discharge the duties required of the commissioners, without the concurrence of the others; and if all except one are willing to act, the court will not grant a peremptory *mandamus* to compel that one to act, for the reason that the issuing of such writ is unnecessary.[2]

§ 46. When Charter Provisions deemed a Substitute for Provisions of a General Act. — Where the charter of a corporation contains provisions in terms similar to provisions of a general act, and provides that the corporation shall be subject to such provisions of the general act as are applicable, the provisions in the charter will be deemed a substitute for the provisions of the general act.[3]

[1] Commonwealth *v.* McKean County Bank, 32 Pa. St. 185.

[2] Matter of White River Bank, 23 Vt. 478.

[3] Briggs *v.* Cape Cod Ship Canal Co., 137 Mass. 71.

§ 47. Whether Corporations created by the Concurrent Action of Two States. — Whether one corporation can be created by the concurrent legislation of two States has been a subject of judicial controversy. The question seems to have been first raised in the Supreme Court of Errors of Connecticut, and that court took substantially the view that there is no legal difficulty in the way of the creation of a single corporation by the concurrent action of two or more States; nor of the creation of a new corporation out of two or more corporations already existing; nor of the creation, by one State, of such a corporation, where one of the constituent corporations is a foreign one. The court saw no objection, technical or otherwise, to the parting, by two or more States unitedly, in the exercise of their sovereign authority, with such of their respective powers as should be necessary in order to confer upon persons, real or artificial, the franchise or privilege of being a corporation, and with such powers and privileges as they should deem it proper to grant them. The court further observed that this power had been not infrequently exercised by the States, without question or objection.[1] It cannot escape attention, however, that this view is contrary to what might be regarded as the *States' rights* view of the question, and that it cannot be made to rest upon a strictly logical basis. If we are to accept as still true the doctrine of the leading case in the Supreme Court of the United States touching the *status* of foreign corporations, we must still conclude that a corporation can have but one domicile and must dwell in the place of its creation.[2] Adhering to this theory, the same court at one time held that a railroad corporation created by the concurrent legislation of two States, with the same capacities and powers, for the same objects, referred to in the laws of the States as one corporate body, composed of the same persons, and represented by one name, — was nevertheless, as a matter of legal and constitutional necessity, two distinct and separate corporations, upon the ground that a corporation is the creature of the sovereignty which brings it into being, and can have no jurisdiction beyond that sovereign.[3] This theory was suitable to the casuistry of one

[1] Bishop *v.* Brainerd, 28 Conn. 289, 299.

[2] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 521.

[3] Ohio & Mississippi R. Co. *v.* Wheeler, 1 Black (U. S.), 286.

period of our legal development and history, but it was not suited to the practical needs of a great homogeneous commercial people. The same court was compelled, in a subsequent decision, to abandon the doctrine, and to adopt the better view that the question whether there is a unity in the corporation and in the proprietorship of the corporate property, is, in such a case, one of legislative *intent*, and not of legislative *power*. Accordingly, the doctrine of the court now is that several States may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one; that one State may make a corporation of another State, as thus organized and conducted, a corporation of its own, as to any property within its territorial jurisdiction; and that a State may, by an enabling act, authorize a corporation created in another State to build and use a railway within its own limits, without creating a new corporation.[1] Illustrations of this conclusion are now seen every day, in the passage by States of enactments making foreign corporations doing business within the domestic jurisdiction, domestic corporations, and amenable in all respects to the domestic laws and police regulations, notwithstanding the provisions of their foreign charters.[2]

§ 48. Decisions adhering to the View that this cannot be done.—The doctrine first announced by the Supreme Court of the United States [3] is still followed, so far as appears, in some of the courts of the States. The Supreme Court of Pennsylvania has reiterated the view laid down by Chief Justice Taney in that case, and has formulated it thus: "1. That the artificial person or legal entity known to the common law as a corporation, can have no legal existence out of the bounds of the sovereignty by which it was created. It must dwell in the place of its creation. 2. That the corporation in question was chartered by the two States of Ohio and Indiana, by the same name and style, clothed with the

[1] Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; followed in Copeland *v.* Memphis &c. R. Co., 3 Woods (U. S.), 651, 658. In another Federal court it was held that where the charter of a corporation in one State is duplicated in another State, and the legislature assumes to create a home corporation, the effect is to consolidate the two; but for purposes of jurisdiction it is a separate corporation within the State of its adoption. In such a case a separate organization is not necessary. Blackburn *v.* Selma &c. R. Co., 2 Flip. (U. S.) 525.

[2] *Post*, Ch. 193.

[3] In Ohio &c. R. Co. *v.* Wheeler, 1 Black (U. S.), 286.

same capacities and powers, and intended to accomplish the same objects, and is spoken of in the laws of both States as one corporate body exercising the same powers and fulfilling the same duties in both States; and yet that it had no legal existence in either of the States, except by the laws of the State, and neither State could confer on it a corporate existence in the other, nor add to or diminish the powers there exercised. Therefore, that it was a distinct and separate corporate body in Indiana, from the corporate body of the same name in Ohio. 3. That, where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body, and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. 4. It follows from these principles that a suit by a corporation created by the concurrent legislation of two States was, in legal contemplation, the suit of the individuals who compose it, and must, therefore, be treated as a suit in which citizens of each State are joined as plaintiffs. If the defendant was a citizen of either of those States, such a suit could not be maintained in the Federal courts, where jurisdiction of the case depended altogether on the citizenship of the parties, and consequently, the plea to the jurisdiction in that case was sustained."[1]

The Court of Appeals of Kentucky, in a decision rendered as late as 1880, adheres to the same view. The question concerned the effect of two acts of incorporation, one passed by the legislature of Ohio and the other passed by the legislature of Kentucky, both incorporating the Newport and Cincinnati Bridge Company, a company whose bridge was built across the Ohio river between the States of Ohio and Kentucky. The appellant contended that the corporation was one entity created by two laws emanating from different sovereigns, with no joint governmental powers over the subject of its properties and business. "This," said Hargis, J., "seems to be an absurdity, because the law-making power of neither State can bind the other. Kentucky or Ohio has plenary power to create a corporation, but neither can create a part of the elements of a corporation and rely upon the other to complete it, and by this unauthorized marriage of distinct legislative powers, produce a being which has not received its full life from either. Each legislative power must complete the corporation, or it never can be done, because the completing act of one State is not binding upon the State

[1] Allegheny County v. Cleveland &c. R. Co., 51 Pa. St. 228, 231, opinion by Woodward, C. J.

which began, but failed or refused to complete and give legal existence to the corporation. Otherwise, persons who should receive from a State only a part of the powers, but were denied the rest which were necessary to create a corporation, could apply to a foreign State for supplementary legislation, which would authorize the building of railroads and bridges upon our soil, and give to its laws an extra-territorial force — a doctrine that has always been successfully denied among these States, which hold the relation to each other of foreign States in close friendship. The creative power of one State can neither be added to nor subtracted from by another, so as to strengthen or weaken the power of the former in its own territory. And the proposition that two States can jointly create, by partial legislation in each, a corporation which has a complete legal existence in either, must fall to the ground. These corporations are distinct, controlling the same substance in a joint business, and appellant's residence is alone in Ohio. A corporation can not have two domiciles or residences at the same time. It obtains a residence not by its own right, but by legal authority which fixes the requisites of residence; and it retains a residence, so long as its legal existence lasts, in the State whence it received it. The appellant was properly sued as a non-resident of Kentucky." The court, coming to the merits, which was the right to recover compensation for legal services, under an employment of the plaintiff by the Kentucky corporation, held that the legal *status* of the two corporations was that of *agents for each other*, and that, upon this theory, the obligation was that of the Ohio corporation, on the principle of *respondeat superior*.[1]

[1] Newport &c. Bridge Co. *v.* Woolley, 78 Ky. 523.

CHAPTER III.

ACCEPTANCE OF SPECIAL CHARTERS.

§ **52. Necessity of Acceptance of Charter.** — When the legislature proceeds to create a municipal or other public corporation, the assent of the inhabitants within the territorial district intended to be incorporated is not necessary. But a man can not be forced by the legislature to become a member of a strictly private corporation without his consent.[1] The general rule, therefore, is that a charter of a private corporation is inoperative until it is accepted.[2] So is the extension of a charter beyond

[1] Ellis *v.* Marshall, 2 Mass. 269; *s. c.* 3 Am. Dec. 49; Hampshire *v.* Franklin, 16 Mass. 76, 87. There is much authority, early and late, for this general proposition. Thus, in Bagg's case, Rolle Rep. 224, it seems to have been agreed by the court that a patent procured by some persons of a corporation would not bind the rest, unless they should assent. And in Brownlow's Reports, 100, this passage occurs: "It was said that the inhabitants of a town cannot be incorporated without the consent of a major part of them, and an incorporation without their consent is void." In like manner in a case in Comberbach, 316, Lord Holt, speaking of a new charter made to the city of Norwich by Henry IV. and confirmed by Charles II., says: "The new charter had been void if the corporation had refused it; but when they accept and put it in execution, then it is good." In like manner, it is said by Chancellor Kent: "It requires the *acceptance* of the charter to create a corporate body; for the government cannot compel persons to become an incorporate body without their consent, or the consent of at least the major part of them." 2 Kent Com. 277. See, further, Lexington and West Cambridge R. Co. *v.* Chandler, 13 Met. (Mass.) 315; Wright *v.* Tukey, 3 Cush. (Mass.) 297; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 708.

[2] Haslett *v.* Wotherspoon, 1 Strobh. Eq. (S. C.) 209.

its original term.[1] So, a charter granted by the king in England to a particular *guild* of tradesmen does not, it seems, bind all the members of that trade in England, which nothing short of an act of Parliament could do, but it binds only those who become members.[2]

§ 53. **Cannot be Accepted in Part.** — As a general rule, when a charter is granted, whether it be one of creation, or of amendment to a pre-existing charter, it must either be accepted or rejected as offered, and without condition; and, in accepting the privileges conferred, the grantees will be required to perform the conditions imposed.[3] A charter granted by the Crown in England, cannot be accepted in part and rejected in part, unless it should appear to be the intention of the Crown that the grantee should have the option to accept in part and reject in part.[4] But it has been said: "However well settled this may be in regard to subsequent conditions, to be performed after the organization of the company, and for a refusal to comply with which a party injured may have his remedy at law or in equity for a specific performance, it does not apply to *conditions precedent*, upon the strict performance of which the very existence and exercise of powers on the part of the corporation depend. And by conditions precedent we mean anything which, by the express provisions of the statute, is made a condition to be performed on the part of the corporators *before and as a foundation of* the exercise of powers and privileges under the charter. In such cases the organic life of the corporation depends upon a strict compliance with the conditions imposed, and until this is done there can be no such thing as an acceptance of the charter."[5]

[1] Lincoln &c. Bank *v.* Richardson, 1 Me. 81. It has been ruled that where a corporation, which is already in existence, and acting under a former charter, or prescription, or usage, accepts a new charter before the expiration of the old, the corporation may still act under the former, or partly under both. Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488.

[2] London Tobacco Pipe Makers Co. *v.* Woodroffe, 7 Barn. & Cress. 838.

[3] Lyons *v.* Orange &c. R. Co., 32 Md. 18, 30; Kenton County Court *v.* Bank Lick Turnpike Co., 10 Bush (Ky.), 529.

[4] Rex *v.* Westwood, 2 Dow & Cl. 21, 36.

[5] Lyons *v.* Orange &c. R. Co., 32 Md. 18, 30. See *post*, § 501, *et seq.*

§ 54. **By what Body or Constituency.**— Acceptance of a charter, to be binding, must obviously be by the corporators in their constituent capacity. Until acceptance, there is ordinarily no representative body which could, under any circumstances or on any theory, perform such an act for the corporators at large, unless in the case of a renewal of a charter. Thus, the election of a board of directors or trustees under a charter is an act which itself implies an acceptance of the charter. But, as hereafter seen, when the charter has been accepted and an organization has taken place under it, and directors have been elected, an *amendment* to the charter may be accepted by the directors, if acquiesced in by the corporators.[1]

§ 55. **At Meeting held in Another State, Void.** — It has been laid down in round terms that "all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void."[2] This is a branch of the general rule declared in a leading case,[3] that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is enacted; that it exists only by force of law; that, where that law ceases to operate, it can have no existence; and that it must dwell in the place of its creation, and cannot migrate to another sovereignty. In this respect a distinction must carefully be borne in mind between acts done by the members in their capacity of corporators, and by the directors in their capacity of agents or trustees. Acts of the former class, to be valid, can only be done within the bounds of the sovereignty creating the corporation; while acts of the latter class may be done outside of such boundaries, and yet be valid.[4] The organization of a corporation is an act which, from its very nature, can only be done by the corporators in their constituent capacity. If, there-

[1] *Post*, § 86.

[2] Miller *v.* Ewer, 27 Me. 509, opinion by Shepley, J.; quoted and reaffirmed in Smith *v.* Silver Valley Mining Co., 64 Md. 85; *s. c.* 54 Am. Rep. 760, 765.

[3] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519.

[4] This distinction is stated in Smith *v.* Silver Valley Mining Co. *supra*, and in other cases. But see Ohio &c. R. Co. *v.* McPherson, 35 Mo. 26, and Arms *v.* Conant, 36 Vt. 750.

fore, they meet in a State other than that by which their existence as a corporation has been authorized and there attempt to organize, their acts will be void, and the corporation will acquire no existence, unless by subsequent events, such as a legislative ratification by the State granting the charter.[1]

§ 56. **Illustrations of the foregoing.** — A writ of entry was brought to recover a tract of land in the State of Maine. The defendants claimed title through a mortgage executed by the president and secretary of the Blue Hill Granite Company, which had been chartered as a corporation by the legislature of Maine in 1836. It appeared in proof that, shortly after the date of the charter, a meeting of the corporators for the purpose of organizing the corporation was called and held in the city of New York; that the charter was there accepted; that the officers of the corporation, consisting of president, secretary and directors, were there chosen; that, at a meeting of the directors which was held in the same city in April, 1837, the president and secretary were, by a vote, authorized to execute the mortgage in question, which they accordingly did. There was no proof that any meeting for the organization of the company, or for the choice of its officers had ever been held in the State of Maine. The court, upon this proof, held that the mortgage passed no title, because the directors who ordered its execution had not been lawfully chosen.[2] - - - - In another case in the same State, a shareholder in a *de facto* corporation sued the company for dividends upon his shares, alleged by him to have been illegally forfeited by the company. It appeared that the act of incorporation had been passed by the legislature of Maine in 1836, and that, in April following, an attempted organization of the corporation had been made in the city of Boston, in Massachusetts, where the number of shares was determined and the certificates issued. The court, following the case last cited, held that the stock certificate which the plaintiff offered in evidence as proof of his right, having been issued by officers chosen in Boston, was invalid, — reasoning that there could be no stock in a non-existent corporation, and that the plaintiff could not have become a stockholder under any attempted organization outside the State granting the char-

[1] Miller *v.* Ewer, *supra;* distinguishing Copp *v.* Lamb, 3 Fairf. (Me.) 314, and McCall *v.* Byram Man. Co., 6 Conn. 428. See Freeman *v.* Machias &c. Co., 38 Me. 343; Smith *v.* Silver Valley Mining Co., 64 Md. 85; *s. c.* 54 Am. Rep. 760, distinguishing Keene *v.* Van Reuth, 48 Md. 184.

[2] Miller *v.* Ewer, 27 Me. 509; *s. c.* 46 Am. Dec. 619. The decision stands on doubtful grounds; they would seem to have been directors *de facto*.

ter.[1] - - - - In a later case in Maryland, a corporate charter had been granted by the legislature of North Carolina. The corporators named by the charter held their first meeting in Baltimore, in the State of Maryland, and there undertook to accept the charter and to organize the corporation. Thereafter, one of the shareholders brought a suit in equity to set aside a forfeiture which the company had undertaken to make of his shares, for the non-payment of an assessment, which had likewise been made at a meeting of the directors held in Baltimore. The court affirmed a decree dismissing the bill, placing its decision on the ground that the corporation had never acquired a legal existence, that no valid shares had been issued, and consequently that the plaintiff had no standing in court.[2] - - - - These three decisions seem to involve distinct departures from the principle that the validity of the existence of a corporation, or of the election of its officers, cannot be inquired into collaterally.

§ **57. Withdrawal or Repeal before Acceptance.** — An offer of a charter to persons who have not applied for it is considered as being *in fieri* until those persons have accepted it; and, like any other offer, it may be withdrawn at any time prior to such acceptance.[3]

§ **58. Illustration.** — An offer of a railroad charter was made to certain persons who had not applied therefor, in January, 1849, by the legislature of Indiana. In June, 1852, these persons first accepted the charter. In November, 1851, the new constitution of Indiana went into effect, which provided that corporations other than banking should not be created by special laws. It was held that the acceptance after November, 1851, was insufficient, and that the corporation never came into existence.[4]

§ **59. Effect of Acceptance.** — Though it is optional with members of a private corporation whether or not they will take

[1] Freeman *v.* Machias &c. Co., 38 Me. 343.

[2] Smith *v.* Silver Valley Mining Co., 64 Md. 85; *s. c.* 54 Am. Rep. 760.

[3] State *v.* Dawson, 16 Ind. 40. A provision that a charter should not take effect unless the company filed a *written assent* thereto in six months, — was held, not to indicate any purpose to repeal a previous legislative provision that all charters should be subject to alteration, suspension, and repeal by the legislature. Little *v.* Bowers, 46 N. J. L. 300. See *post*, § 92.

[4] State *v.* Dawson, 16 Ind. 40.

the benefit of their charter, yet after they have made their election, by executing the powers granted, or otherwise, the duties and liabilities attach which the charter imposes.[1] By accepting the charter, they become bound by all its provisions, and cannot insist that the enactment of any provision therein was fraudulently obtained.[2] Stated more fully, it has been reasoned that an act of incorporation, which, after naming certain persons, declares that they "and such others as may hereafter become associated with them for that purpose, and their successors, are hereby declared and created a body politic and corporate," constitutes such persons a corporation immediately on the passage of the act, if there are no conditions that must be complied with before they can become a body corporate. It is true that the charter of a corporation must be accepted; but in cases of private corporations created for individual benefit, the presumption is, that they are created at the instance and on the request of the parties to be benefited thereby, and consequently, are accepted by them. If, therefore, they are found exercising the privileges granted, it will be almost conclusive evidence of the fact of acceptance.[3]

§ 60. Facts from which acceptance presumed. — An acceptance by the corporators of their charter and franchises may be presumed from a variety of circumstances, — such as the existence of the corporate powers conferred;[4] the fact that a charter has been applied for;[5] or *user* of the franchises or powers conferred.[6]

[1] Riddle *v.* Proprietors of Locks &c., 7 Mass. 184; Goshen Turnpike *v.* Sears, 7 Conn. 86; Commonwealth *v.* Worcester Turnpike Co., 3 Pick. (Mass.) 327.

[2] Bushwick &c. Bridge Co. *v.* Ebbetts, 3 Edw. Ch. (N. Y.) 353. See *ante*, § 38.

[3] Talladega Ins. Co. *v.* Landers, 43 Ala. 115, 136. As to what acts on the part of corporators will constitute an acceptance of their charter, so as to *estop* them from denying the validity of contracts entered into by the *de facto* officers of the corporation, see Heath *v.* Silverthorn Lead Min. &c. Co., 39 Wis. 147.

[4] Penobscot Boom Corp. *v.* Lawson, 16 Me. 224; Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102. See also Astor *v.* New York Arcade R. Co., 48 Hun (N. Y), 562.

[5] Atlanta *v.* Gate City Gas-Light Co., 71 Ga. 106.

[6] Illinois River R. Co. *v.* Zimmer, 20 Ill. 654 (case of an amendment); Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 632.

§ 61. Further of Evidence to show such Acceptance. — It is not essential, then, that the acceptance of a charter should appear in the *records* of the corporation.[1] It may be inferred from *acts* of the corporators, or of the corporation,[2] — at least unless the charter in terms requires some express act of acceptance from the corporators; [3] or, in case of an amendment to the charter, from acts of the directors.[4] Such evidence is afforded by the act of *organizing* as a corporation and exercising the franchises conferred; [5] or by the fact of *expenditures* and other transactions in furtherance of the purpose thereof, without proof of any formal organization, by meeting, election, etc.[6] So, a *notice* for a meeting to organize, signed by those named in the charter, is evidence of an acceptance of the charter.[7]

§ 62. Evidence of Non-acceptance. — On the other hand, this presumption of acceptance from the fact that the charter has been applied for is *rebutted* by evidence that no proceedings were ever had under it, although *seven years* have elapsed since its date.[8] The proprietors of a toll bridge, several years after it was built, were incorporated by the legislature, but did not accept the charter. In a *quo warranto* against them by the attorney-general, they had denied that they had ever assumed to act as a corporation, and a judgment of preclusion was thereupon entered. It was held, that this *judgment* was *conclusive evidence* that they had not accepted their charter, and could not be impeached collaterally.[9]

[1] Russell *v.* McLellan, 14 Pick. (Mass.) 63.

[2] Taylor *v.* Newberne, 2 Jones Eq. (N. C.) 141.

[3] Logan *v.* McAllister, 2 Del. Ch. 176.

[4] *Post*, § 87.

[5] *Ibid.*

[6] McKay *v.* Beard, 20 S. C. 156.

[7] Gleaves *v.* Turnpike Co., 1 Sneed (Tenn.), 491. In 1851, the legislature of Minnesota authorized the organization of the "St. Paul Div. No. 1 Sons of Temperance" as a corporation, with power to sue and be sued, make contracts, and hold and sell real and personal property. The division had existed under that name since 1849. These facts, together with the exercise of corporate powers in conveying real estate as security for a loan, were deemed sufficient to justify a referee in finding that the division accepted the act of incorporation. St. Paul Division *v.* Brown, 11 Minn. 356.

[8] Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 632.

[9] Thompson *v.* New York &c. R. Co., 3 Sandf. Ch. (N. Y.) 625.

§ 63. A Question for a Jury. — The question of the acceptance of an act of incorporation is for the *jury*, in an action at law.[1] This is analogous to the rule in the law of contracts, that whether there has been a verbal acceptance of a written proposal is a question for a jury;[2] and to the rule in respect of *dedications* of land to public purposes, that, whether there has been an acceptance of the dedication is a question for a jury.[3] If, however, the only evidence which is tendered to show an acceptance is a *writing*, the effect of such writing, as evidence of an acceptance, will be a mere question of *interpretation*, for the judge.[4]

[1] Hammond *v.* Straus, 53 Md. 1.

[2] 1 Thomp. Tr., § 1114.

[3] *Ibid.*, § 1356.

[4] 1 Thomp. Tr., § 1065 *et seq.*

CHAPTER IV.

AMENDMENT OF CHARTERS.

§ 66. **Preliminary.** — The constitution of the United States provides that "no State shall * * * pass any * * * law impairing the obligation of contracts."[1] It was established by the Supreme Court of the United States, in the celebrated case of *Dartmouth College* v. *Woodward*,[2] that the charter of a private corporation, when granted by the legislature and accepted by the grantees, becomes a *contract* between the State and the corporation, which can not be impaired by subsequent legislation, without the consent of the other contracting party. It is not intended in this chapter to enter upon a general discussion of the inviolability of corporate charters under this decision; that subject is reserved for future treatment.[3] It will be necessary, however, to consider the subject in this chapter, in so far as it involves the question of the power of the legislature to grant amendments to corporate charters on the application of a majority of the members, or of the governing body, but without the concurrence of all the members, so as to bind the corporation or the dissenting members.

§ 67. **Power of Legislature to amend Charters.** — In the case of municipal or other public corporations, the charter does not constitute a contract between the State and the corporators within the meaning of the clause of the constitution of the United States above quoted. It follows that, in respect of *public corporations*, the power of the legislature to alter, modify or abrogate any corporate power or franchise conferred by previous charter is *plenary*, and no member will be heard to object thereto.[4] But, by reason of this constitutional prohibition, it is regarded by most courts as beyond the power of the legislature

[1] Const. U. S., Art. 1, § 10.

[2] 4 Wheat. (U. S.) 519; reversing *s. c.* 1 N. H. 111.

[3] *Post*, Ch. 117, Art. I., *et seq.*

[4] People *v.* Morris, 13 Wend. (N. Y.) 325; Cole *v.* East Greenwich Fire Engine Co., 12 R. I. 202; Louisville *v.* Louisville University, 15 B. Monr. (Ky.) 642; Head *v.* University, 19 Wall. (U. S.) 526.

of a State to make *fundamental changes* in the charter of an existing *private corporation*, such as materially alter the nature of the corporation, or change, or enlarge its powers or purposes, without the consent of all the stockholders or members,[1] unless the legislature has reserved the power to make such changes in the original charter, or unless such power is reserved to the legislature in the constitution of the State,[2] or in some statute which is operative notwithstanding the silence of the charter.[3] But if the power to alter or repeal is reserved in the incorporating act, or otherwise as above stated, the legislature may make such alterations or amendments as it may see fit, and the judicial courts will have no power to consider their propriety.[4]

[1] Livingston *v.* Lynch, 4 Johns. Ch. 573; Natusch *v.* Irving, 2 Coop. Ch. (Tenn.) 358.

[2] If the power is reserved in the constitution of the State, it need not be contained in the charter. Delaware Railroad Co. *v.* Tharp, 5 Harr. (Del.) 454.

[3] Mowrey *v.* Indianapolis R. &c. Co., 4 Biss. (U. S.) 78; City of Covington *v.* Covington &c. Bridge Co., 10 Bush (Ky.), 69; Allen *v.* Buchanan, 9 Phil. (Pa.) 283; Indiana &c. Turnp. Road *v.* Phillips, Penr. & W. (Pa.) 184; State *v.* Heyward, 3 Rich L. (S. C.) 389; Winter *v.* Muscogee R. Co., 11 Ga. 438; New Orleans &c. R. Co. *v.* Harris, 27 Miss. 517; Fry *v.* Lexington &c. R. Co., 2 Metc. (Ky.) 314; Hamilton *v.* Keith, 5 Bush (Ky.), 458. The cases cited do not, all of them, express fully the doctrine of the text. It has been drawn on a comparison of many decisions. In some of the cases general expressions are found to the effect that an act of the legislature granting new franchises to an existing corporation upon specified conditions, is inoperative until it is acepted. Lyons *v.* Orange &c. R. Co., 33 Md. 18. It was said by Lord Holt, C. J., that although the king might make such a constitution as they themselves (meaning the corporation) might have done without him, but the new charter had been void if the corporation had refused it; but when they accept and put it in execution then it is good. Rex *v.* Larwood, Comb. 315, 316.

[4] Miners' Bank *v.* United States, 1 Greene (Iowa), 553; *s. c.* 1 Morr. (Iowa) 482; Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457; State *v.* Granville &c. Society, 11 Ohio, 1; Sala *v.* New Orleans, 2 Woods (U. S.), 188; Lothrop *v.* Stedman, 42 Conn. 583; Gardner *v.* Hope Ins. Co., 9 R. I. 194; *s. c.* 11 Am. Rep. 238; Lothrop *v.* Stedman, 13 Blatch. (U. S.) 134; Joslyn *v.* Pacific Mail Steamship Co., 12 Abb. Pr. (N. S.) (N. Y.) 329; Com. *v.* Fayette Co. R. Co., 55 Pa. St. 452; Robinson *v.* Gardiner, 18 Gratt. (Va.) 509; Close *v.* Glenwood Cemetery, 107 U. S. 466 (charter granted by Congress). It is added in some cases that this rule is subject to the qualification that the power is not to be exercised in such a way as to violate the principles of natural justice. Sala *v.* New Orleans, 2 Woods (U. S.), 188; Lothrop *v.* Stedman, 13 Blatch. (U. S.) 134.

§ 68. Amendments in Furtherance of the Original Design. — This rule does not extend so far as to prevent the legislature from enacting amendments to a charter, in furtherance of the original design, on the application of the corporation or of a majority of the members.[1] The constitutionality of a statute, by which certain stockholders of a railroad company were required to waive their interest in a municipal subscription in aid of the railroad, has been upheld, on the ground that, without the aid of the subscription under the amended charter, the stock of such subscribers would be worthless, and that they could not lose, but must gain, by the provision complained of.[2] The mere grant of *auxiliary powers* to enable the corporation the better to carry out the original design, does not constitute such a radical and fundamental change in the objects and purposes for which the original company was chartered, as places the amendment within the category of statutes impairing the obligation of contracts. Instead of impairing the obligation of the contract expressed in the charter, it aids and effectuates it.[3] The same may be said of amendments removing restrictions, or releasing or discharging burdens to which the corporation is subject under an existing statute,[4] — such as an amendment empowering a religious corporation to sell for its own benefit its real estate, although its charter forbids such alienation;[5] or *extending the time* within which the corporation may complete its undertaking.[6]

§ 69. Amendments Granting or Altering Remedies. — Nor does this constitutional inhibition extend so far as to disable the legislature of a State from altering an existing charter of a private corporation, so as merely to effect a change of remedies

1 State *v.* Accommodation Bank of La., 26 La. Ann. 288; Fry *v.* Lexington &c. R. Co., 2 Metc. (Ky.) 314; Winter *v.* Muscogee R. Co., 11 Ga. 438.

2 Shelby County *v.* Shelby Railroad Co., 5 Bush (Ky.), 225.

3 Sprigg *v.* Western U. Tel. Co., 46 Md. 67; Gifford *v.* New Jersey R. Co., 10 N. J. Eq. 171; Mayor of Wetumpka *v.* Winter, 29 Ala. 651; Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457; Curry *v.* Scott, 54 Pa. St. 270; Zabriskie *v.* Hackensack &c. R. Co., 3 Green (N. J.) 178.

4 People *v.* Grand &c. Plank Road Co., 10 Mich. 400.

5 Burton's Appeal, 57 Pa. St. 213.

6 Taggart *v.* Western Maryland R. Co., 24 Md. 563; *s. c.* 89 Am. Dec. 761, 771; Union Hotel Co. *v.* Hersee, 79 N. Y. 458.

without divesting any existing rights.[1] The power of a State to regulate the forms of administering justice is an incident of sovereignty, and its surrender is never presumed. Therefore a statute which prescribes a mode of serving process upon railroad companies, different from that provided for in a charter previously granted to a particular company, does not impair the obligation of the contract between such company and the State, and is not invalid.[2] So, it has been held that the legislature has the power to modify at its pleasure a summary remedy against defaulting stockholders given to a corporation by its charter.[3] So, although a charter contain no provision for the *liquidation* of a corporation in case of its *dissolution*, the omission may be supplied by subsequent legislation, without impairing the obligation of the contract between the State and the corporators, conceding the charter to be such.[4] So, a provision in a special charter prescribing the manner in which the corporation must proceed in *condemning land*, must yield to a subsequent general law prescribing a different mode.[5] There is more difficulty in upholding amendments which grant to individuals remedies against the corporation which did not exist before, in such a sense that the right inheres in the remedy. Thus, it has been reasoned, with reference to a corporation which found it necessary to damage land in the prosecution of its works, that the legislature could not, by a law enacted subsequent to its charter, give to landowners a remedy for damages where none existed under the charter. But where a supplementary charter had been accepted by the corporation, in which a power was reserved to the legislature to alter and amend its charter so as to do no injustice to its stockholders,— it was held competent for the legislature to enact a law giving to land-owners a remedy for damages already done.[6] But such remedies may be given in the exercise of the *police power*, which the State possesses alike over persons and corporations.[7]

[1] Reapers' Bank *v.* Willard, 24 Ill. 433; Gowen *v.* Penobscot R. Co., 44 Me. 140; Cummings *v.* Maxwell, 45 Me. 190; Hyatt *v.* McMahon, 25 Barb. (N. Y.) 457.

[2] Railroad Co. *v.* Hecht, 95 U. S. 168; affirming *s. c.* 29 Ark. 661.

[3] Ex parte North East &c. R. Co., 37 Ala. 679.

[4] Haynes *v.* Carter, 9 La. An. 265.

[5] McCrea *v.* Port Royal R. Co., 3 S. C. 381; *s. c.* 16 Am. Rep. 729.

[6] Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379.

[7] See Board of Int. Imp. *v.* Scarce,

§ 70. Amendments made in the Exercise of the Police Power. — Nor can the legislature of the State, by the grant of a particular charter to a private corporation, disable future legislatures from enacting wholesome and necessary police regulations;[1] though in many cases great difficulty will be found in drawing the line between an inviolable charter right and a police regulation which it is competent for the legislature to enact. It has been held that a statute of Massachusetts, relating to the manufacture and sale of malt and other *intoxicating liquors*, is in the nature of a police regulation of a particular kind of property, and applies to such property when in the hands of corporations as well as when in the hands of individuals; and that it does not impair the obligation of the contract contained in the charter of a corporation, although the corporation was created before the passage of the statute, under a charter which authorized it to manufacture such liquors, and although the legislature had reserved no power to alter, modify or repeal the charter.[2] It has been held in Connecticut that a statute requiring a railroad company to reopen and maintain a station on its road, which it has abandoned, is not in the nature of an amendment of the charter, requiring acceptance by the company before it can take effect, but is an exercise of the legislative authority to direct the management of the road, and is obligatory, from the time of its enactment.[3]

§ 71. What Amendments Release Non-assenting Subscribers. — The relation between a corporation and a stockholder is one of *contract*, and hence any legislative enactment which, without the assent of the stockholder, authorizes a material change in the powers or purposes of the corporation, not in aid of its original object, is not binding upon him.[4] The grounds

2 Duv. (Ky.) 576; *post*, next section, and Ch. 118.

[1] *Post*, Ch. 118. Rodemacher *v.* Milwaukee &c. R. Co., 41 Iowa, 297 (imposing liability for railway fires); Wilder *v.* Maine Central R. Co., 65 Me. 332 (requiring railway companies to fence their tracks); State *v.* Noyes, 47 Me. 189; Indianapolis &c. R. Co. *v.* Townsend, 10 Ind. 38.

[2] Com. *v.* Certain Intoxicating Liquors, 115 Mass. 153. Compare Beer Co. *v.* Massachusetts, 97 U. S. 25.

[3] State *v.* New Haven &c. R. Co., 43 Conn. 351. See, in supposed illustration of the text, State *v.* Greer, 9 Mo. App. 219 (changing mode of voting at corporative elections).

[4] Sparrow *v.* Evansville &c. R. Co., 7 Ind. 369; McCray *v.* Junction

on which stockholders are entitled to claim a release from the obligation of their subscription, where there has been a material change in the charter, are very plain. By his subscription, the stockholder agrees to furnish money to be applied for a particular purpose. This, of course, does not bind him to furnish the money if it is to be applied to a materially different purpose.[1] A strictly logical, though extreme view is, that the alteration of a corporate charter, affecting substantially the character of the enterprise, can be had only by *unanimous consent* of the members of the corporation. There are cases which uphold this rule to the extent of declining any inquiry into the advantage or disadvantage which may flow from such a change to a dissenting stockholder, or into the materiality or immateriality of the amendment as affecting his contract, or into the private reasons which he may have for dissenting from the change.[2] They concede to him the right to say *non hæc in fædera veni.*[3] But, as corporate ventures, owing to unforeseen difficulties, can seldom be carried out in strict accordance with the original undertaking, most courts have found this rule too severe for practical justice.[4] Two qualifications have therefore been grafted upon

R. Co., 9 Ind. 358; Booe *v.* Junction R. Co., 10 Ind. 93; Martin *v.* Junction R. Co., 12 Ind. 605; State *v.* Bailey, 16 Ind. 46.

[1] Union Locks &c. Co. *v.* Towne, 1 N. H. 44; *s. c.* 8 Am. Dec. 32. See also Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268; Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384; *s. c.* 6 Am. Dec. 139; Ang. & A. Corp., § 537. Of course, and under any rule or theory, the *consenting shareholders* are bound. Chesapeake &c. Canal Co. *v.* Robertson, 4 Cranch C. C. (U. S.) 291.

[2] Central R. Co. *v.* Collins, 40 Ga. 617; Zabriskie *v.* Hackensack R. Co., 18 N. J. Eq. 170.

[3] Union Locks &c. Co. *v.* Towne, 1 N. H. 44; *s. c.* 8 Am. Dec. 32.

[4] It has been observed: "Such a rule has been found too stringent for the practical administration of justice. Too much power would thus be placed in a small majority to clog the wheels of a large corporation, by interposing an injunction to its further progress, under an amendment which, though making no material change in the charter, might yet contain such further privileges or indemnities as would be not only highly beneficial to the corporation, but also, perhaps, absolutely necessary to the profitable prosecution of its business. Or, again, a corporator might, under this rule, when his subscription to the capital stock was sought to be collected, avoid it upon the ground that the charter had been changed in some immaterial way, though the alteration had never affected his interests. The courts have, therefore, almost unanimously agreed in restricting their protection over the minority to those changes in the charter which are radical." 53 Am. Dec. 462, note.

it: 1. That it does not apply where the change produced by the amendatory act is *trifling* or *immaterial*.[1] 2. That it does not apply, at least in its full force, where the act of incorporation is by its terms *subject to amendment*, alteration or repeal at the pleasure of the legislature.[2] But, unless this power is reserved, it must follow that the legislature cannot, in an amendatory act, authorize the majority to accept the amendment so as to bind the minority; because this would have the effect of impairing the obligation of the contract entered into among the corporation, the majority and the minority in the original subscription;[3] though an act of the English or Canadian parliament, which is not under such a constitutional restraint, could easily go to this extent.[4]

§ 72. View that Majority binds Minority except as to Fundamental Changes. — Most of the cases unite upon the practical and just rule that, when a person subscribes to the capital stock of a corporation, he does it with the implied understanding that changes may be made in the charter by the action of the majority, which do not radically deflect the enterprise from its original purposes. Accordingly, the rule is said to be, that in the absence of a power reserved by or to the legislature to amend the charter, or of a provision in the charter that the majority may accept an amendment thereto, — an acceptance by the majority of a *material*, *radical* or *fundamental change* in the charter binds only the accepting majority, and discharges a dissenting shareholder from his contract of subscription.[5] On

[1] Milford &c. Turnp. Co. *v.* Brush, 10 Oh. 111; *s. c.* 36 Am. Dec. 79.

[2] Such has been the case with all the Massachusetts acts of incorporation granted since March, 1831. Agricultural Branch Railroad *v.* Winchester, 13 Allen (Mass.), 32, per Chapman, J.

[3] New Orleans &c. R. Co. *v.* Harris, 27 Miss. 517.

[4] The English courts have gone further, and have qualified the rule that a majority cannot bind the minority in a joint-stock company as to acts not contemplated by the common contract (Burmester *v.* Norris, 6 Exch. 796), by holding that it does not apply to corporate companies organized under sanction of Parliament for an undertaking involving *public interests* and duties. Ffooks *v.* London &c. R. Co., 17 Jur. 365; Stevens *v.* South Devon R. Co., 13 Beav. 48.

[5] Mowrey *v.* Ind. & Cin. R. Co., 4 Biss. (U. S.) 86; Clearwater *v.* Meredith, 1 Wall. (U. S.) 25, 40; Railway Co. *v.* Allerton, 18 *Id.* 233, 235; Ashton *v.* Burbank, 2 Dill. (U. S.) 435;

the other hand, those changes in the charter which in no way materially affect the compact subsisting among the shareholders, but which merely have the effect of clothing the corporation with additional immunities and privileges, in furtherance of the original design of its incorporation, will, when accepted by a majority in amount or number of the shareholders, according to the method of voting prescribed by the charter or governing statute,[1] bind the whole corporation, and a dissenting member will remain liable on his shares.[2]

Printing House *v.* Trustees, 104 U. S. 711; Kenosha &c. R. Co. *v.* Marsh, 17 Wis. 13; Indiana &c. Turnp. Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184; Brown *v.* Fairmount Min. Co., 10 Phila. (Pa.) 32; Turnp. Co. *v.* Arndt, 31 Pa. St. 317; Lauman *v.* Lebanon Valley &c. R. Co., 30 *Id.* 42; McCray *v.* Junction R. Co., 9 Ind. 358; Booe *v.* Junction R. Co., 10 *Id.* 93; Shelbyville Turnp. Co. *v.* Barnes, 42 *Id.* 498; Supervisors of Fulton Co. *v.* Miss. &c. R. Co., 21 Ill. 338; Troy &c. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581, 607; Buffalo &c. R. Co. *v.* Pottle, 23 *Id.* 21; Hartford &c. R. Co. *v.* Croswell, 5 Hill (N. Y.), 383, 386; New Orleans &c. R. Co. *v.* Harris, 27 Miss. 517, 537, 539; Hester *v.* Memphis &c. R. Co., 32 *Id.* 380; Champion *v.* Memphis &c. R. Co., 35 *Id.* 692; State *v.* Accommodation Bank of La., 26 La. Ann. 288; Hoey *v.* Henderson, 32 *Id.* 1069; Stevens *v.* Rutland &c. R. Co., 29 Vt. 546; Waring *v.* Mayor &c. of Mobile, 24 Ala. 701; Winter *v.* Muscogee R. Co., 11 Ga. 438; Fry *v.* Lexington R. Co., 2 Met. (Ky.) 314; Thompson *v.* Guion, 5 Jones Eq. (N. C.) 113; Charlotte Bank *v.* Charlotte, 85 N. C. 433; Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268; Middlesex Turnp. Corp. *v.* Swan, 10 *Id.* 385; Old Town &c. R. Co. *v.* Veazie, 39 Me. 571; Kean *v.* Johnson, 9 N. J. Eq. 407; Black *v.* Delaware &c. Canal Co., 24 *Id.* 455, 466; Tuttle *v.* Mich. Air Line, 35 Mich. 247; Marietta &c. R. Co. *v.* Elliott, 10 Oh. St. 57; Union Locks &c. *v.* Towne, 1 N. H. 44; Witter *v.* Miss. R. Co., 20 Ark. 488; Mississippi &c. R. Co. *v.* Cross, *Id.* 443. See Clinch *v.* Financial Co., L. R. 4 Ch. Ap. 117; Dougan's Case, L. R. 8 Ch. Ap. 540; Simpson *v.* Denison, 10 Hare, 54, 56.

[1] Generally a majority in *value*, and not a majority in *number;* otherwise a majority in number having but a relatively small interest in the corporation, could, by their acceptance of an amendment to its charter, control the majority in amount and change the nature of their investment. Witter *v.* Mississippi &c. R. Co., 20 Ark. 463.

[2] Fry's Executors *v.* Lexington &c. R. Co., 2 Met. (Ky.) 322; Waring *v.* Mayor &c. of Mobile, 24 Ala. 201; Everhart *v.* Westchester &c. R. Co., 28 Pa. St. 339; Irvine *v.* Turnp. Co., 2 Penr. & W. (Pa.) 474; Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.), 364; Poughkeepsie &c. Plank R. Co. *v.* Griffin, 24 N. Y. 150; Taggart *v.* Western Md. R. Co., 24 Md. 564; Bank *v.* Richardson, 1 Me. 79; Bucksport R. Co. *v.* Buck, 68 *Id.* 81; Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488; Greeneville &c. R. Co. *v.* Johnson, 8 Baxt. (Tenn.) 332; State *v.* Accommodation Bank of La., 26 La. Ann. 288; Joy *v.* Jackson &c. R. Co., 11 Mich. 155; Wilson *v.* Wills Valley R. Co., 33

§ 73. View that Majority binds Minority unless there is a Total Deviation from the Original Object. — There is another and more limited view, that a change in the charter, procured and accepted by a majority of the shareholders, will bind the minority, unless the change is so radical as to have the effect to wrench the enterprise, so to speak, entirely from its original purpose, — as to change a canal company into a railway company, an insurance company into a banking company, or the like. The view of these cases is that the dissenting minority remain bound upon their contracts of subscription, provided the general character and scope of the corporation remains the same under the amendment as before, although the amendment has worked a grave alteration in its organization, or in respect of the extent of the undertaking which it was originally planned to perform.[1] In the view of these courts, the *will of the majority* should govern, unless there is fraud, or an entire change in the original purpose.[2]

§ 74. What Changes are Material so as not to Bind Minorities. — Amendments to the charters of *railway companies* which essentially *vary the route* of the road,[3] so as to cause it to run through a different section of country, or otherwise essentially alter its plan, or *change its terminus*,[4] or *extend the road* be-

Ga. 470; Fall River Iron Works *v.* Old Colony R. Co., 5 Allen (Mass.), 221; Agricultural R. Co. *v.* Winchester, 13 *Id.* 29; Peoria *v.* Preston, 35 Iowa, 115.

[1] Banett *v.* Alton &c. R. Co., 13 Ill. 504; Peoria &c. R. Co. *v.* Elting, 17 *Id.* 429; Sprague *v.* Illinois Riv. R. Co., 19 *Id.* 174; Illinois Riv. R. Co. *v.* Zimmer, 20 *Id.* 654; Rice *v.* Rock Island R. Co., 21 *Id.* 93; Illinois Grand Trunk R. Co. *v.* Cook, 29 *Id.* 243; Ross *v.* Chicago &c. R. Co., 77 *Id.* 134; Pacific R. Co. *v.* Renshaw, 18 Mo. 210; Pacific R. Co. *v.* Hughes, 22 *Id.* 297. See also Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156; Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392; Delaware R. Co. *v.* Tharp, 1 Houst. (Del.) 174; Martin *v.* Pensacola R. Co., 8 Fla. 381; Dayton &c. R. Co. *v.* Hatch, 1 Disney (Oh.), 84; Currie *v.* Mut. Ass. Soc., 4 Hen. & M. (Va.) 315.

[2] Sprague *v.* Illinois &c R. Co., 19 Ill. 174; Illinois &c. R. Co. *v.* Zimmer, 20 Ill. 654; Ross *v.* Chicago &c. R. Co., 77 Ill. 127. Compare Fulton County *v.* Marsh, 10 Wall. (U. S.) 677.

[3] Hester *v.* Memphis &c. R. Co., 32 Miss. 380; Champion *v.* Memphis &c. R. Co., 35 *Id.* 692; Winter *v.* Muscogee R. Co., 11 Ga. 45; Buffalo &c. R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21.

[4] Marietta &c. R. Co. *v.* Elliott, 10 Oh. St. 57; Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 267; Middlesex Turnp. Corp. *v.* Swan, *Id.* 385; Plank Road &c. Co. Arndt, 31 Pa. St. 317; Thompson *v.* Guion, 5 Jones Eq. (N. C.) 113.

yond its charter limits,[1] — will release a dissenting stockholder. It is not enough that there may have been such a change as will prejudice the personal interests of the dissenting stockholder. If the general course of the roadway remains the same and no change has taken place such as sacrifices to a material extent the interests of the corporation, it will not be regarded as fundamental, in such a sense as to release dissenting stockholders.[2] Nor will an amendment conferring the power to construct a *branch road* have this effect, the termini of the main line remaining the same.[3] But one who has subscribed to the stock of a "life and accident" insurance company is not bound to pay his subscription after the company has been authorized, by a change in its charter, to transact the business of "fire, marine, and inland insurance." [4]

§ 75. Amendments Authorizing Consolidation or Subdivision.— Many decisions hold that an amendment providing for a *consolidation* of the corporation with another is of such a fundamental character as releases dissenting shareholders in either company;[5] and it has been held that equity will *restrain* a consolidation, at the suit of a dissenting stockholder, until security is given him for the value of his interests.[6] So, an amendment

[1] Stephens *v.* Rutland &c. R. Co., 29 Vt. 545.

[2] Fry *v.* Lexington &c. R. Co., 2 Metc. (Ky.) 322, 323; Wilson *v.* Wills Valley R. Co., 33 Ga. 466; Irvine *v.* Turnpike Co., 2 Penr. & W. (Pa.) 474; Banet *v.* Alton &c. R. Co., 13 Ill. 504; Fall River Iron Works *v.* Old Colony R. Co., 5 Allen (Mass.) 221.

[3] Peoria &c. R. Co. *v.* Preston, 35 Ia. 115.

[4] Ashton *v.* Burbank, 2 Dill. (U. S.) 435.

[5] Pearce *v.* Madison R. Co., 21 How. (U. S.) 441; Mowrey *v.* Cincinnati R. Co., 4 Biss. (U. S.) 83; Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; Tuttle *v.* Michigan Air Line, 35 Mich. 247; New Jersey &c. R. Co. *v.* Strait, 35 N. J. L. 322; Carlisle *v.* Terre Haute &c. R. Co., 6 Ind. 316; McCray *v.* Junction R. Co., 9 Ind. 358; Booe *v.* Junction R. Co., 10 Ind. 93; Shelbyville Turnp. Co. *v.* Barnes, 42 Ind. 498; Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42. Compare Clinch *v.* Financial Co., L. R. 4 Ch. 117; Dougan's Case, L. R. 8 Ch. 540; Thomas *v.* Railroad Co., 101 U. S. 71; East Anglian R. Co. *v.* Eastern Counties R. Co., 11 C. B. 775; Eastern Counties R. Co. *v.* Hawkes, 5 H. L. Cas. 331; Abbott *v.* Johnstown &c. R. Co., 8 N. Y. 27; McGregor *v.* Deal &c. R. Co., 18 Ad. & El. (N. S.) 618; *s. c.* 22 L. J. (Q. B.) 69; Kean *v.* Johnson, 9 N. J. Eq. 401; Troy &c. R. Co. *v.* Boston &c. R. Co., 86 N. Y. 117; Middletown *v.* Boston &c. R. Co., 53 Conn. 351.

[6] Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 42.

providing for a *subdivision* of the corporation is fundamental and will release dissenting subscribers.[1] But where there is, at the time of the incorporation, a general statute authorizing the consolidation, the rule is different; for here the implication of the law is that the shareholder consents to hold his shares subject to the governing statute, which enters into and forms a part of the contract.[2] Laws have been enacted in some of the States providing that, on the consolidation of two or more corporations, a dissenting stockholder may have his stock appraised and purchased by the consolidated company.[3]

§ 76. **Other Changes deemed Fundamental.** — An amendment authorizing a *lease* of the corporate property to another corporation for *999 years* rests on the same footing as an amendment authorizing a consolidation, and is obviously fundamental in such a sense that it will be *restrained* in equity at the option of a dissenting stockholder.[4] So is an amendment conferring the privilege of *selling the road* owned by the corporation.[5] So is an alteration reducing the minimum number of subscribed shares, thus rendering a stockholder liable who otherwise would not be.[6]

§ 77. **Further Holdings on this Subject.** — The view which disregards the personal interests of the stockholder, although he may have been induced to subscribe for his shares with the chief view of promoting those interests,[7] leads easily to such conclusions as that his contract is not materially impaired when the majority, contrary to his wishes, accept an amendment *extending the road beyond its charter terminus*,[8] or even *changing its ter-*

[1] Supervisors *v.* Mississippi &c. R. Co., 21 Ill. 338; Indiana &c. Turnp. Co. *v.* Phillips, 2 Penr. & W. (Pa.) 184.

[2] Sparrow *v.* Evansville &c. R. Co., 7 Ind. 369; Railroad Co. *v.* Black, 79 Ill. 264. Compare Simpson *v.* Denison, 10 Hare, 51.

[3] N. J. Laws 1878, p. 58, § 2; *Id.* 1881, p. 222, § 8; *Id.* 1883, p. 242, § 2; N. Y. Laws 1884, Ch. 367. So in England: 25 & 26 Vict., Ch. 89, § 161, 175.

[4] Black *v.* Delaware &c. Canal Co., 24 N. J. Eq. 455.

[5] Kean *v.* Johnson, 9 N. J. Eq. 407.

[6] Old Town &c. R. Co. *v.* Veazie, 39 Me. 571.

[7] This is the view of several of the courts. Sprague *v.* Illinois &c. R. Co., 19 Ill. 174; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654. See also Irvine *v.* Turnpike Co., 2 Penr. & W. (Pa.) 466.

[8] Peoria &c. R. Co. *v.* Elting, 17 Ill.

mini;[1] or reducing its length; [2] or directing material alterations in its terminus, including the abandonment of one depot and the erection of another; [3] and one court has gone so far as to hold that the subscriber's contract is not impaired unless he is obliged to pay more money on his subscription.[4]

§ **78. Amendments Increasing the Capital Stock.** — As hereafter seen,[5] a corporation cannot increase its potential capital stock, without authority from the legislature, expressed in its charter or governing statute. An increase of its capital stock is a change of such a fundamental character that, where the governing statute empowers the corporation to do it, but does not provide by whom the power shall be exercised, it can not be exercised by the directors, but must be exercised by the shareholders, or by the directors by the authority of the shareholders.[6] But it does not follow from this that an increase of the capital by a majority of the stockholders, under an amendment to a charter, or under a general law, will operate to discharge a dissenting shareholder. One view is that the shareholder takes his shares subject to the implication that the legislature may authorize the board of directors to make such an increase.[7] Another is that whether the capital stock has been properly increased is a question which the State alone can raise,[8] — at least that it cannot be raised by a shareholder, under a plea of *non-assumpsit*, when sued on his contract of subscription.[9] But a shareholder who, after the capital stock of the company has been increased, retains his shares and participates in the profits, is *estopped* by his

429; Rice *v.* Rock Island R. Co., 21 *Id.* 93; Cross *v.* Peach Blossom R. Co., 90 Pa. St. 392.

[1] Sprague *v.* Illinois River R. Co., 19 Ill. 174. See also Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Ross *v.* Chicago &c. R. Co., 77 Ill. 134.

[2] Troy &c. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 607; *contra*, Kenosha &c. R. Co. *v.* Marsh, 17 Wis. 13.

[3] Worcester *v.* Norwich &c. R. Co., 109 Mass. 103.

[4] Delaware R. Co. *v.* Tharp, 1 Houst. (Del.) 149.

[5] *Post*, § 2079.

[6] Eidman *v.* Bowman, 58 Ill. 444; *s. c.* 11 Am. Rep. 90; Railway Co. *v.* Allerton, 18 Wall. (U. S.) 233. Compare Nashua &c. R. Co. *v.* Boston &c. R. Co., 27 Fed. Rep. 826; Venner *v.* Atchison &c. R. Co., 28 Fed. Rep. 589.

[7] Payson *v.* Withers, 5 Biss. (U. S.) 276. See also Pacific R. Co. *v.* Hughes, 22 Mo. 291; *s. c.* 64 Am. Dec. 295.

[8] Pullman *v.* Upton, 96 U. S. 329, per Mr. Justice Strong.

[9] Judgm., *Ibid.*

conduct[1] from claiming exemption from the responsibilities of his contract after the company has become insolvent.[2] But the rule may be different where the increase is wholly *unauthorized*, and the question arises between the subscriber and the company in an action for calls.[3]

§ 79. **Illustrations.** — It has been held that an increase of the capital of a plank-road company and an application of the funds so raised to the construction of a branch road, in pursuance of an act of the legislature passed since the date of a stock subscription, will not release a stockholder.[4] - - - - Nor did a subsequent legislative amendment of the charter of a railway company, changing its name, and authorizing an increase of its capital and an extension of its road; and this, whether the alteration was beneficial to the stockholders or not, it having been duly made, and without any fraud on the part of the company.[5] - - - - Upon like grounds, where the charter of an insurance company recited, "the capital stock shall be $1,000,000, and may be increased to not exceeding $5,000,000, at the discretion of the stockholders," and, after a person had subscribed for a given number of shares, the legislature amended the charter by declaring "*the board of directors* shall have power to increase the capital stock of said company from time to time, in their discretion," — a subsequent increase made by the directors, under the power thus conferred, was not such a change in the contract of subscription as the legislature was prohibited from authorizing, and did not discharge the shareholder.[6]

[1] *Post*, § 2083.

[2] Chubb *v.* Upton, 95 U. S. 665.

[3] Thus, where the directors of a plank-road company, after the formation of the company, extended the main line of the road beyond the point originally specified, and increased its capital stock, without the written consent of the persons owning two-thirds of the capital stock, or a majority of the inspectors, etc., as provided by the first section of the New York Plank-Road Act, Laws N. Y. 1849, ch. 250, such acts being unauthorized and illegal, exonerated the original stockholders from all liability to pay their subscriptions. Nor would the fact that the stockholder participated in the proceedings of the company to extend the road, and retained his stock after the extension has been made, and then sold the same for a valuable consideration to a third person, estop him from denying his liability to pay his subscription. Macedon &c. Plank-road Co. *v.* Lapham, 18 Barb. (N. Y.) 312; Middlesex Turnp. Corp. *v.* Lock, 8 Mass. 268; Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384; Stevens *v.* Rutland &c. R. Co., 1 Am. L. Reg. 154; *s. c.* 29 Vt. 545.

[4] Schenectady &c. R. Co. *v.* Thatcher, 11 N. Y. 102.

[5] Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336.

[6] Payson *v.* Withers, 5 Biss. (U. S.) 269.

§ 80. When Stockholder bound on Principle of Acquiescence, Ratification or Estoppel. — Although the stockholder does not affirmatively assent to the amendment of the charter, and although the amendment may be of such a nature, or the rule in the particular jurisdiction such that, if he had seasonably dissented, the effect would have been to discharge him from his liability as a stockholder, — yet if he lie by, expressing no dissent, but allowing the corporation to go on under the amended charter, incurring additional liabilities on the faith of his responsibility as a subscriber to its capital stock, he will, on obvious principles, preclude himself from setting up the defense of this change in the charter, when proceeded against by the corporation or by its creditors to collect his unpaid subscription, or otherwise to enforce his liability as a shareholder; and it is quite immaterial whether his liability is placed on the ground of the loss of his rights by *laches*, or his validation of an act of the majority, not otherwise binding upon him, by his *acquiescence*, or on the principle of an *equitable estoppel*, — though the better reason seems to place it on the last named ground.[1]

§ 81. Effect of Want of Knowledge of the Change on the Part of a Shareholder. — It should seem, on principle, that a shareholder ought to be required to take sufficient interest in the affairs of the corporation to know of an act of such importance and publicity as a legislative amendment of the charter of the corporation. It has accordingly been held that one who has subscribed for shares in a corporation after it has accepted an amendment of its charter, cannot avoid liability on his subscription on the ground that he was *ignorant* of the change.[2] And this is so for stronger reasons, where the shareholder, subse-

[1] Chubb *v.* Upton, 95 U. S. 665; *ante,* § 61; *post,* § 3681.; Martin *v.* Pensacola R. Co., 8 Fla. 370; Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Houston *v.* Jefferson College, 63 *Id.* 428; Danbury &c. R. Co. *v.* Wilson, 22 Conn. 435; Vermont &c. R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 2; Hayworth *v.* Junction R. Co., 13 Ind. 348; Gifford *v.* New Jersey R. Co., 10 N. J. Eq. 176; Zabriskie *v.* Hackensack &c. R. Co., 18 *Id.* 178; Ex parte Booker, 18 Ark. 338; Mowrev *v.* Ind. & Cin. R. Co., 4 Biss. (U. S.) 79; Upton *v.* Jackson, 1 Flip. C. C. (U. S.) 413; Owen *v.* Purdy, 12 Ohio St. 79; Goodin *v.* Evans, 18 *Id.* 150.

[2] Sparrow *v.* Evansville &c. R. Co., 7 Ind. 369; Eppes *v.* Mississippi &c. R. Co., 35 Ala. 54.

quently to the amendment, has voted at corporate meetings and otherwise acted in a manner consistent only with the view of his being a shareholder.[1]

§ 82. Other Alterations Immaterial and hence Permissive.— Among the amendments of the charter which are deemed immaterial, or in furtherance of its design, and hence permissive, are amendments *changing the name* of the corporation.[2] Where a railroad charter has been granted by the legislature subject to alteration or repeal, an amendment *extending the time* for the completion of the road, is no alteration of the contract with a subscriber to its stock.[3] Such an amendment, being for the benefit of the corporation, will be *presumed* to have been passed with the consent of the stockholders.[4] So, an alteration in the charter of a private corporation, increasing the *number of directors* from five to nine, is not a fundamental alteration, and may be accepted by a majority of the stockholders.[5] So, of an amendment *changing the location* of a turnpike road; the governing principle here declared being that the benefit which results to individual property by the incorporation of a company and the location of a road does not, in contemplation of law, enter into the consideration of the contract of subscription, and that such subscriptions are necessarily subject to the power of the legislature to change the location of the road, where the contrary is not expressly stipulated.[6] Nor did a subsequent alteration of the charter of a navigation company, extending its privileges, although its liabilities might thereby be extended.[7] Nor did a subsequent act of Parliament, authorizing a railway company to buy and work a *canal* from M. to A., and to make a railway from D. to M. only, when the contract of subscription

[1] Bedford R. Co. *v.* Bowser, 48 Pa. St. 29. But see, *contra*, Old Town &c. R. Co. *v.* Veazie, 39 Me. 571.

[2] Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336; Reading *v.* Wedder, 66 Ill. 80; Bucksport &c. R. Co. *v.* Buck, 68 Me. 81; Milwaukee &c. R. Co. *v.* Field, 12 Wis. 340; *post*, § 287.

[3] Agricultural Branch R. Co. *v.* Winchester, 13 Allen (Mass.), 29.

[4] San Antonio *v.* Jones, 28 Tex. 19.

[5] Mower *v.* Staples, 32 Minn. 284.

[6] Irvin *v.* Turnpike Co., 2 Penr. & W. (Pa.) 466, opinion by Gibson, C. J. Compare Central Plank Road Co. *v.* Clemens, 16 Mo. 359, 366.

[7] Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156.

provided for forming a company to make a railway "from D. to M., and thence to A."[1]

§ 83. Amendments Changing Denomination of Shares. — Where the original charter provided that the capital stock should be divided into shares of $200 each, and the subscriber took four shares of this denomination, and afterwards the charter was changed, dividing the capital stock into shares of $100 each, which act was accepted by the corporation, and four shares were assigned to the subscriber, for which he paid in part, he was deemed to have assented to the change.[2]

§ 84. View that Subscription is made Subject to Legislative Power to amend Charter. — Early decisions of the Supreme Court of Pennsylvania denied the foregoing principles, and overrode the rights of subscribers to the capital stock of turnpike companies, by holding that such subscriptions to a corporation, providing for the location of a turnpike road, were subject to the power of the legislature to change the location of the road *at an intermediate point*, unless the contrary was expressed.[3] These cases proceed on an assumption which in many cases is contrary to the fact, and therefore unsound as the basis of a legal conclusion, that the benefit which results to individual property, from the incorporation of such a company and the location of its road, does not, in contemplation of law, enter into the consideration of the contract of subscription; wherefore it is reasoned that such subscriptions are necessarily subject to the power of the legislature to change the location of the intended road, where the contrary is not expressly stipulated.

[1] Midland &c. R. Co. *v.* Gordon, 16 Mee. & W. 803. Many other cases are found tending to establish the same doctrine: Middlesex T. Co. *v.* Locke, 8 Mass. 268; Hartford &c. R. Co. *v.* Croswell, 5 Hill, 383; Indiana &c. T. Co. *v.* Phillips, 2 Penn. 184; New Orleans &c. R. Co. *v.* Harris, 27 Miss. 517.

[2] Kennebec &c. R. Co. *v.* Waters, 34 Me. 369. But the mere fact that the *denomination of shares* has been *changed*, if the shares are capable of being traced and identified, is no objection to their validity, and no reason why their holder should not, in the event of a winding-up, be placed on the list of contributories. Sewall's Case, L. R. 3 Ch. 131; Feiling's Case, L. R. 2 Ch. 714. Compare Ind's Case, L. R. 7 Ch. 485.

[3] Irvin *v.* Turnp. Co., 2 Penr. & W. (Pa.) 466; followed in Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 161, and in Union Canal Co. *v.* Young, 1 Wheat. (U. S.) 428. Compare Mercer County *v.* Coovert, 6 Watts & S. (Pa.) 71, where the first of the above cases is commented upon.

§ 85. Materiality of Amendment Question for Court. — Whether the *alteration of a written instrument* is material or not, within the meaning of the rule by which an unauthorized alteration discharges an obligor thereon, is a question of law for the court, and is not to be submitted to a jury.[1] By analogy to this rule, the question whether the amendment of a charter by a corporation is material or not, within the meaning of the rule previously stated,[2] is a question of law for the court, and is not to be submitted to the jury.[3] But it is a principle of procedure that, although the judge errs in submitting a question of law to the jury, yet if the jury decide it rightly, a new trial will not be granted.[4] Agreeably to this principle, where a judge erroneously submitted to a jury the question of the materiality of an amendment to the charter of a corporation, and they decided the question in favor of the party asserting its materiality, and it appeared to the reviewing court that it was the evident purpose of the act to legalize previous illegal proceedings, and that its effect was to reduce the capital stock at the option of the corporation, — the court refused to set aside the verdict.[5]

§ 86. What Body may give Assent. — Fundamental alterations of the charter, of the character above spoken of, can only be assented to by the body who compose the corporation; and where that body is the stockholders, the *directors* or trustees have no power to accept or reject such alterations.[6] But while

[1] Belfast Nat. Bank *v.* Harriman, 68 Me. 522; Wood *v.* Steel, 6 Wall. (U. S.) 80; Overton *v.* Matthews, 35 Ark. 147.

[2] *Ante*, § 71.

[3] Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240; Witter *v.* Mississippi &c. R. Co., 20 Ark. 463.

[4] Bernstein *v.* Humes, 78 Ala. 141; Jones *v.* Pullen, 66 Ala. 306; Glenn *v.* Charlotte &c. R. Co., 63 N. C. 10; State *v.* Craton, 6 Ired. L. (N. C.) 164; Thornburg *v.* Maston, 93 N. C. 258, 264; Woodbury *v.* Taylor, 3 Jones L. (N. C.) 504.

[5] Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240. But it has been held not error to submit to a jury the question whether a change in the charter was radical, with the direction to find that the subscriber could not be held to his subscription, if such was the case — a ruling distinctly opposed to the statement of the text and unsound in principle. Southern Penn. &c. Co. *v.* Stephen, 87 Pa. St. 190. There is also a holding to the effect that the materiality of the departure must rest purely upon the circumstances of each case, though it is held to be a question of law, to be decided by the court, on facts found or admitted. Witter *v.* Mississippi &c. R. Co., 20 Ark. 463.

[6] Com. *v.* Cullen, 13 Pa. St. 133;

they have no authority in the first instance to apply to the legislature for, or to accept for the corporation, an amendment of its charter ; yet, if they do accept such an amendment and act under it for the corporation, the effect may follow of binding the individual members, on the principle of *ratification* or *acquiescence*.[1] It is scarcely necessary to add that, where a fundamental alteration of a corporate charter is procured by the unauthorized action of certain individual members or officers, without any corporate action, a non-assenting stockholder, who has not put himself in the position of ratifying the legislation, will not be bound by it.[2] An exceptional rule exists in Illinois, whereby the assent of the directors to an amendment of the charter is held sufficient to bind dissenting stockholders and prevent them from being discharged, by reason of the change of contract produced by the amendment, from their contract of subscription. That court started out by holding that amendments to the charter, of an essential character, might be accepted by a *majority* of the stockholders.[3] It was an easy transition from this doctrine to the conclusion that the will of this majority might fairly be supposed to be evidenced by the action of the board of directors, their representative. It has accordingly been held in that State that an acceptance may be made by the board of directors so as to bind dissenting stockholders. The court say: "There are various modes by which amendments to charters may be accepted by corporations, or rather by which such acceptance may be established, either for or against the corporation. The first, and perhaps the most satisfactory, is where an amendment is asked for in a general meeting of the stockholders, or where an amendment, after it is passed, is accepted by a majority in interest at such meeting. But this is not the only, nor indeed the

s. c. 53 Am. Dec. 450; Brown *v.* Fairmount Mining Co., 10 Phila. (Pa.) 32. That the directors cannot change essentially the business of the corporation, see Abbott *v.* Railway Co., 33 Barb. (N. Y.) 583; Cherokee Iron Co. *v.* Jones, 52 Ga. 276.

1 Marlborough Man. Co. *v.* Smith, 2 Conn. 579; Brown *v.* Fairmount Min. Co., 10 Phila. (Pa.) 32; Mutual Fire Ins. Co. *v.* Stokes, 9 Phila. (Pa.) 80. Compare Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) (N. Y.) 434; *s. c.* 37 How. Pr. (N. Y.) 110; 54 Barb. (N. Y.) 42; Banks *v.* Judah, 8 Conn. 160.

2 Mississippi &c. Boom Co. *v.* Prince, 34 Minn. 71; *s. c.* 24 N. W. Rep. 344.

3 *Ante*, § 73.

most usual mode, in this country, of accepting amendments to corporate charters. This is generally done by the board of directors, who are for the most part vested with all the corporate powers of the company. We know of no case where it has been questioned that the board of directors have power to accept an amended charter, while that power has been expressly asserted in at least two different cases by this court." [1]

§ 87. **When the Action of the Directors Evidence of Acceptance.** — Where a new power is conferred upon a corporation, to be exercised within the general powers of the directors, conferred upon them by the governing statutes and by the bylaws of the company, the new power thus conferred is impliedly to be exercised in like manner as similar powers conferred by the original charter; and when there is nothing in the grant which, expressly or by inference, demands action by the stockholders, and the privilege granted contemplates an act within the scope of the authority of the directors of an existing organization, the action of the directors alone will be sufficient evidence of acceptance.[2]

[1] Illinois River R. Co. *v.* Zimmer, 20 Ill. 654, 661; citing Banet *v.* Alton &c. R. Co., 13 Ill. 508, and Sprague *v.* Illinois River R. Co., 19 Ill. 174. The language above quoted was re-affirmed in Illinois River R. Co. *v.* Beers, 27 Ill. 185, 189. In Illinois River R. Co. *v.* Zimmer, *supra*, Mr. Chief Justice Caton, who delivered the opinion of the court, further said: "Indeed, upon examination, it would probably be found that not one in twenty of the amended, or even original charters, under which corporations in this State are now exercising their franchises, has ever been accepted by a formal vote of the stockholders at large, and probably a majority have never been adopted by a formal vote even of the board of directors, but have been accepted by user alone, which is another and a common mode of accepting an original charter by the corporators, and even amendments thereto, both of which stand upon precisely the same footing in point of law. In neither case does the act of incorporation become the law of the corporators, prescribing the extent of their rights and the measure of their liabilities, till they have accepted its benefits and consented to be bound by their liabilities. If they claim the one they must submit to the other." As to what body may give assent to amendments on application to a judicial *court*, see *post*, § 127.

[2] Eastern Railroad Co. *v.* Boston and Maine Railroad, 111 Mass. 125, 130; citing Charles River Bridge Co. *v.* Warren Bridge, 7 Pick. (Mass.) 344; Middlesex Husbandmen *v.* Davis, 3 Metc. (Mass.) 133; Bangor &c. R. Co. *v.* Smith, 47 Me. 34.

§ 88. **Illustration.** — A statute authorized a railroad company to take for a passenger station land occupied by another railroad. The by-laws of the company provided that the directors might purchase all real estate they deemed needful for the railroad, and exercise all powers granted to the company by their charter, for the purpose of locating, constructing and completing the railroad, and all other powers necessary and proper to carry out the object of the company and the purposes of their charter. It was held that an acceptance of the statutes by the stockholders was not necessary to authorize the directors to take the land.[1]

§ 89. **Effect of Reservation of Power to Alter or Repeal.**— The reservation of the right of alteration and repeal in the charter of a corporation has none of the characteristics of a mere power, which, when once exercised, is *exhausted*. Its operation is on the legislative grant itself, to prevent its becoming, what it otherwise might become, a contract with the State. An act containing such a provision confers *a mere privilege*, subject at any time to be withdrawn or modified at the will of the legislature.[2] A different statement of the same principle is that, on the acceptance by the corporation, the reservation by the legislature, of the power to alter and amend its charter at pleasure, becomes *part of the contract* between the State and the corporators, and the exercise of it in no manner impairs the obligation of the contract, within the meaning of the constitution of the United States.[3]

[1] Eastern Railroad Co. *v.* Boston and Maine Railroad, 111 Mass. 125.

[2] State *v.* Commissioners, 37 N. J. L. 228.

[3] Sprigg *v.* Western Tel. Co., 46 Md. 67. See also Hyatt *v.* Whipple, 37 Barb. (N. Y.) 595; Hyatt *v.* Esmond, 37 Barb. (N. Y.) 601. Perrin *v.* Oliver, 1 Minn. 202. In a case in Kentucky this salutary principle is entirely frittered away, by annexing to the legislative reservation of the power to alter, amend or repeal an act of incorporation, the implication that the power is to be exercised subject to the right of the corporation to accept or reject any amendment or alteration made by the legislature. Sage *v.* Dillard, 15 B. Monr. (Ky.) 340. The absurdity of such a conclusion suggests itself without a moment's thought. The reasoning by which it is attempted to enforce this conclusion is a strange abuse of reasoning upon the impropriety of an act of the legislature, by which that body undertook, by adding sixteen new trustees to an educational corporation, to change entirely the control and direction of the corporation. The court seemed to lean partly on the view that the reserved power to amend the contract of incorporation which subsisted between the corporation and the State, was a power to amend it between the

§ 90. Whether this Power merely a Reservation to State for Public Purposes. — There is a conflict of judicial opinion as to the extent of the power which is reserved to the legislature by a provision in a charter, in a constitution, or in a general statute relating to corporations, reserving to it the power to alter or repeal corporate charters. One view is that the power is plenary, that the reservation lifts the legislature of the State above the operation of the rule in the Dartmouth College case, by a mere contract between it and any corporation which it creates, arising by implication from an acceptance of the charter, so that it becomes, in respect of its power over the charter, as powerful as is the British Parliament. Under this view, the reserved power of the legislature extends not only to altering the charter, for any purpose connected with the public interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves. This view has been taken in New York,[1] in Massachusetts,[2] in Illinois,[3] in Missouri,[4] and in other States. A necessary result of this doctrine is that the legislature may authorize any change in the organization, purposes or powers of the corporation which the majority may desire, contrary to the will of the minority. Some of the cases above quoted qualify the rule so as to state that this may be done provided the change is not a great departure from the original pro-

same persons, and not a power so to change it as to divest the persons in possession of their franchise and substantially vest such franchise in other persons. But it is apparent that no extended course of reasoning can be made on either of these propositions, which will not result in the absurd conclusion that the creature which the legislature has invested with the mere *privilege* of existence, subject to its plenary power and absolute will, is by the judicial courts erected into a being above the legislature which created it.

[1] New York R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; White *v.* Syracuse &c. R. Co., 14 Barb. (N. Y.) 560; Schenectady &c. R. Co. *v.* Thacher, 11 N. Y. 102; Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336.

[2] Durfee *v.* Old Colony R. Co., 5 Allen (Mass.), 230.

[3] Banet *v.* Alton &c. R. Co., 13 Ill. 504.

[4] Pacific R. Co. *v.* Renshaw, 18 Mo. 210; Pacific R. Co. *v.* Hughes, 22 Mo. 291; *s. c.* 64 Am. Dec. 265. See also Meadow Dam Co. *v.* Gray, 30 Maine, 548. It is conceded, however, in Missouri, that the rule would not apply in case the power reserved by the legislature were so exercised as to cause an entire revolution in the character and objects of the corporation, such as changing a railroad company into a manufacturing company, or the like. The application of the rule has been held unquestionable where all the changes which were effected by the amendments were such as an enlight-

ject; but the principle remains the same. The other view is that this reservation is intended to prevent the evils which flow from inconsiderate legislation under the rule in the Dartmouth College case; that it is intended merely as a reservation, on the part of the State, of the power to alter or repeal charters, when necessary to protect the interests of the State or of the public; and that the legislature of a State cannot, with the inhibition of the Federal constitution resting upon it, by such a reservation, create for itself the power to impair the obligation of contracts subsisting between private parties. This latter view was very clearly expressed by Chancellor Green in the following language: "It was a reservation to the State for the benefit of the public, to be exercised by the State only. The State was making what had been decided to be a contract, and it reserved the power of change by altering, modifying, or repealing the contract. Neither the words nor the circumstances nor apparent objects for which this provision was made can, by any fair construction, extend it to giving a power to one part of the corporators, as against the other, which they did not have before."[1]

§ **91. Further of this Subject.** — Clearly there must be some limitation on the power of the legislature under such a reservation. Taking the largest possible view of the scope of such a reservation and conceding that it leaves the legislature of a State substantially where the Parliament of Great Britain stands, with plenary power over the subject, yet, as elsewhere seen, there is authority in the judgments of the English courts for the proposition that the Parliament cannot force a man to become a member of a corporation against his will.[2] This conclusion flows from the consideration that, in the nature of things, there are implied reservations upon the power of the legislature in every free government, which do not depend for their sanction

ened policy might well have suggested as beneficial to the State as well as to the company, and such as to preserve the company its identity, and to preserve the character which it had when first created. Pacific Railroad *v.* Renshaw, 18 Mo. 210, 216. Compare Ware *v.* Grand Junction &c. Co., 2 Russ. & M. 470.

[1] Zabriskie *v.* Hackensack &c. R. Co., 3 Green (N. J.), 78; *s. c.* 90 Am. Dec. 617, 622. Compare the opposing opinions in the Sinking Fund Cases, 99 U. S. 700, and in Munn *v.* Illinois, 94 U. S. 113.

[2] *Ante*, § §2.

upon the prohibitions of written constitutions.[1] It is therefore supposed to be, under all theories which obtain in American courts, a necessary limitation upon the power of State legislatures that such a legislature cannot force upon a body of co-adventurers powers and privileges which even the majority of them are not willing to accept, — in other words, that it cannot force men to engage in a business of a private character in which they do not see fit to engage. On the other hand, it can, of course, incorporate any community or territorial subdivision of the State for *municipal* or *public* purposes, against the will of the inhabitants, in the absence of any constitutional restraint. But here the resemblance between public and private corporations, in respect of this question, ends. The distinction taken by the Missouri court, in two cases already cited,[2] between *public* and *private* corporations, in respect of this question, is no distinction whatever in principle. It can make no difference whatever in respect of the rights of the subscriber, whether the corporation be merely a private venture, or whether the public interest be involved therein; since (outside of the power of taxation) the public is no more entitled, than a man's co-adventurers in a strictly private enterprise would be, to demand his money for a purpose for which he had never agreed to give it. If the public want a different enterprise from the one to which the subscriber has agreed to contribute, the public ought to pay for it. A new limitation of the power of the State legislatures has arisen under the Fourteenth Amendment to the constitution of the United States,[3] which provides: "Nor shall any State deprive any person of life, liberty or property without due process of law." This limitation will probably prove more effective for the protection of the rights of minority stockholders than that relating to the obligation of contracts.[4]

§ 92. Power to Alter or Repeal, reserved in a General Law, applies to Future Special Charters. — The power re-

[1] Loan Association *v.* Topeka, 20 Wall. (U. S.) 665.

[2] Pacific R. Co. *v.* Renshaw, 18 Mo. 210; Pacific R. Co. *v.* Hughes, 22 Mo. 291; *s. c.* 64 Am. Dec. 265.

[3] Const. U. S., 14th Amend., § 1.

[4] See People *v.* O'Brien, 111 N. Y. 36; Chicago &c. R. Co. *v.* Minnesota, 134 U. S. 418.

served to the legislature by the terms of a general statute, prospective in its language, to amend or repeal, at the will of the legislature, all grants to corporations or amendments thereof, operates on all future charters, although such charters are silent on the subject of such legislative right, and becomes a part of the contract created by them, as much so as if expressed in the charter itself. The principle *generalia specialibus non derogant*, does not apply in such a case, for to make it apply would be to defeat the plain legislative intent. The principle rather applies that grants by the State to corporations are to be strictly construed in favor of the State and against the corporation, and that privileges or immunities not expressly conferred are not to be regarded as passing by the grant, where the instrument itself is silent, and another statute, intended to be applicable to all future grants of such a character, prescribes that the privilege or immunity shall not pass.[1]

§ **93. Illustration.** — The legislature of Kentucky passed a general law providing that "all charters and grants of (*sic*) or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed, — provided that, whilst privileges and franchises so granted may be changed by repeal, no amendment or repeal shall impair other rights previously vested." It has been held that the proviso to this statute was intended to secure the rights of beneficiaries and others, vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchise. Subsequently to the passage of this statute the legislature of Kentucky created an insurance company, without expressly reserving in the charter the power to repeal it. Three years later the legislature passed an act re-

[1] Suydam *v.* Moore, 8 Barb. (N. Y.) 358; Read *v.* Frankfort Bank, 23 Me. 318; Fry *v.* Lexington &c. R. Co., 2 Metc. (Ky.) 314; Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.), 592; State *v.* Maine Central R. Co., 66 Me. 488; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 458; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; Bangor &c. Railroad *v.* Smith, 49 Me. 9; Roxbury *v.* Boston &c. Railroad, 6 Cush. (Mass.) 424; Holyoke *v.* Lyman, 15 Wall. (U. S.) 500; Miller *v.* State, 15 Wall. (U. S.) 488; State *v.* Commissioner, 37 N. J. L. 228, 237; Story *v.* Jersey City &c. R. Co., 16 N. J. Eq. 13; State *v.* Person, 32 N. J. L. 134; *s. c.* affirmed, *Id.* 566; West Wisconsin R. Co. *v.* Supervisors, 35 Wis. 257; General Hospital *v.* Insurance Co., 14 Gray (Mass.), 227; Pennsylvania College Cases, 13 Wall. (U. S.) 190, 213; Sala *v.* New Orleans, 2 Woods (U. S.), 188; Lothrop *v.* Stedman, 42 Conn. 453.

pealing the charter of such company. It was held that the repealing act was constitutional and valid.[1]

§ 94. Subsequent General Laws operating as Amendments of special Charters. — Where the power to alter or repeal is reserved in a special charter, a subsequent general statute, applicable to all corporations of the kind, will operate as an amendment of the special charter of the particular corporation. Thus, if the charter of a railroad company is granted subject to the power of the legislature to amend it, a subsequent statute requiring all railroad companies to maintain fences on their roads where running within the limits of any highway, will operate as an amendment of the special charter, and the corporation will be bound to perform the duty thereby enjoined, or answer in damages to the traveler injured through its non-performance.[2]

§ 95. Amendments authorizing a Surrender of Franchises.— As private corporations have the general power of surrendering their franchises and thereby ceasing to exist,[3] it necessarily follows that a statute authorizing a strictly private corporation to do this, does not impair the obligation of the contract subsisting between the State and the corporation, because it merely operates as giving the consent of the State to what the corporation has power to do without such consent.[4] It is, therefore, a general principle that a corporation may at any time *surrender its charter*, and accept a new one with other and different provisions.[5] An exception to this rule exists in the case of corporations which have assumed duties toward the public which they may not rightfully cast off by their voluntary action.[6]

§ 96. When Acceptance of Amendment not Necessary.—As elsewhere seen,[7] cases may arise where an *additional power*, conferred upon a corporation by an act of the legislature supplementary to its charter, will be merely in furtherance of power

[1] Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.), 592.

[2] Durand *v.* New Haven &c. Co., 42 Conn. 211.

[3] *Post*, Ch. 154.

[4] Houston *v.* Jefferson College, 63 Pa. St. 428, 437.

[5] Attorney-General *v.* Clergy Society, 10 Rich. Eq. (S. C.) 604.

[6] *Post*, Ch. 154.

[7] *Ante*, § 68, 87, 88.

conferred upon the directors by a by-law of the company, so that it will not be necessary to the exercise of the power by the directors that the stockholders should expressly authorize them to act in conformity with it.[1]

§ **97. Evidence of Acceptance of Amendment by Corporation.** — It has been well said that it is an acceptance *in fact* of the amendment to the charter, and not the filing of any formal certificate of acceptance, that binds a corporation to the amendment.[2] It is also a reasonable conclusion that the assent of a corporation to an alteration of its charter may be inferred from such facts or omissions as would raise such a presumption in the case of a natural person.[3] There is a *presumption* of an acceptance where the amendment consists of a grant *beneficial* to the corporation.[4] Such an acceptance may be shown by the exercise by the corporation of the powers conferred by the amendment;[5] by showing that the corporation has done particular corporate acts authorized by the amendment, but without which such acts would not have been authorized;[6] by the fact that the *officers* of the corporation have exercised the powers conferred by it;[7] or, in general, by showing acts or omissions on the part of the corporation inconsistent with any other hypothesis.[8] Where such an assent is sought to be proved

[1] Eastern R. Co. *v.* Boston &c. R. Co., 111 Mass. 125; *s. c.* 15 Am. Rep. 13.

[2] Cincinnati &c. R. Co. *v.* Cole, 29 Ohio St. 126; Zabriskie *v.* Cleveland &c. R. Co., 23 How. (U. S.) 381.

[3] Sumrall *v.* Sun Mutual Ins. Co., 40 Mo. 27, 32; Commonwealth *v.* Cullen, 13 Pa. St. 133; *s. c.* 53 Am. Dec. 450.

[4] "Where the new grant is beneficial in its aspect, it is thought very little is required to found a presumption of acceptance." Bell, J., in Com. *v.* Cullen, 13 Pa. St. 133; *s. c.* 53 Am. Dec. 450, 454. See also Bangor &c. R. Co. *v.* Smith, 47 Me. 34.

[5] Wetumpka &c. R. Co. *v.* Bingham, 5 Ala. 658; Palfrey *v.* Paulding, 7 La. An. 363; Bangor &c. R. Co. *v.* Smith, 47 Me. 34; Goodin *v.* Evans, 18 Ohio St. 150; Penobscot Boom Co. *v.* Lamson, 16 Me. 224; *s. c.* 33 Am. Dec. 656. A *general act*, amounting to an amendment of all railroad charters, was deemed to have been accepted by action under it by the officers, who had power to request amendments, no stockholders ever objecting to it. Smead *v.* Indianapolis &c. R. Co., 11 Ind. 104. And this rule applies when the powers are conferred by a *general law*, which is declared applicable to any one of a class of corporations that may accept its provisions. Goodin *v.* Evans, 18 Oh. St. 150.

[6] Kent County Court *v.* Bank Lick Turnpike Co., 10 Bush (Ky.), 529.

[7] Story, J., in U. S. *v.* Dandridge, 12 Wheat. (U. S.) 64.

[8] Hope &c. Ins. Co. *v.* Beckmann,

by a *vote of acceptance* on the part of the corporation, it should appear that the vote was passed at a general meeting, duly convened, after notice to all the members: the election of corporate officers, in pursuance of a new charter or the alteration of an old charter, is but presumptive evidence of an acceptance of the amendment creating the alteration.[1] So, if the taking effect of the act depends upon the performance by the corporation of *conditions precedent* prescribed by the act, an acceptance in strict conformity with the provisions is necessary to render the act operative, either as a grant to or an obligation upon the corporation.[2]

§ 98. **Evidence of Acceptance by Stockholders.** — The rule of the preceding section does not, on principle, hold as against *dissenting stockholders* and their privies.[3] When the question arises between a dissenting stockholder, or his privies, on the one hand, and the corporation or the majority shareholders on the other, and he has not lost his rights by laches or estoppel, — then it is a fair view that he is not bound, because it is one of his rights as a member to have his dissent heard and discussed in a corporate meeting.[4] But circumstances may of course exist from which the assent of the objecting subscriber to the alterations in the charter, which were made subsequently to his subscription, may be inferred, without direct evidence of such assent.[5] And where it does not appear by whom an amendment to the corporate charter was accepted, or whether it was accepted at all, it is sufficient, *prima facie*, if it appear that the corporation is organized and acting under it; and in an action by such a corporation, the plaintiff is not under the burden of showing such an acceptance. It is said that, while an issue might be made that would involve the question, yet in the prosecution of

47 Mo. 93; Hope &c. Ins. Co. *v.* Koeller, 47 Mo. 129; Wetumpka &c. R. Co. *v.* Bingham, 5 Ala. 657; State *v.* Sibley, 25 Minn. 387; Palfrey *v.* Paulding, 7 La. An. 363; Covington *v.* Covington &c. R. Co., 10 Bush (Ky.), 69; Bangor &c. R. Co. *v.* Smith, 47 Me. 34.

1 Com. *v.* Cullen, 13 Pa. St. 133; *s. c.* 53 Am. Dec. 450.

2 Lyons *v.* Orange &c. R. Co., 32 Md. 18.

3 Vermont & Canada R. Co. *v.* Vermont &c. R. Co., 34 Vt. 50; Owen *v.* Purdy, 12 Oh. St. 73; Lyons *v.* Orange &c. R. Co., 18 Md. 32; New Orleans &c. R. Co. *v.* Harris, 27 Miss. 517.

4 Com. *v.* Cullen, 13 Pa. St. 133; *s. c.* 53 Am. Dec. 450.

5 See in illustration of this, Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181, 190.

its ordinary business, the assent to the new charter will be inferred from any acts or omissions which are inconsistent with any other hypothesis.[1] In like manner it is said by the Supreme Court of Ohio: "The law protects any stockholder who, his assent being requisite to the amendment of a charter, has not assented. If a personal charge is sought to be fixed upon him by virtue of such amended charter, he may deny that he assented; he is not concluded by any presumption, arising from the acts of the other corporators or corporate body. If his interest in the corporation or rights as a stockholder will be affected by acting under the amended charter before it is accepted in the prescribed mode, he may invoke the aid of the State in a *quo warranto;* or, in an action by himself, the power of a court to restrain. But it cannot be permitted that a corporator, though his assent be in the first instance required, shall stand by, consenting to the progress of a corporation, under a charter, and then, when his interest shall so require, set up, either as a claim or defense, that, for want of his direct assent, the grant of a charter was not effective, and the acts done were illegal." [2]

§ 99. View that Assent of Stockholder is to be Presumed, and Dissent Proved.— It is said in an authoritative work that "no point is more clearly and firmly settled than that if a corporation procure an alteration to be made in its charter, by which a new and different business is superadded to that already contemplated, such stockholders as do not assent to the alteration will be absolved from liability on their subscription to the capital stock." [3] This language has been criticised as maintaining the proposition that affirmative assent is in such a case required.[4] The following proposition in the work of Mr. Kyd has been judicially approved: "It seems to be the first suggestion of reason that an act done by a simple majority of a collective body of men, which concerns the common interest, should be binding on the whole; and that is the principle of the rule adopted by the common law of England with respect to aggregate corpora-

[1] Hope Mut. Fire Ins. Co. *v.* Beckmann, 47 Mo. 93, 97.

[2] Owen *v.* Purdy, 12 Oh. St. 79. The principle that a minority stockholder may, by his *laches*, lose his right to object to a reorganization, seems to have been first decided in Connecticut in 1830: Banks *v.* Judah, 8 Conn. 160.

[3] Ang. & A. Corp., § 537.

[4] Martin *v.* Pensacola &c. R. Co., 8 Fla. 370; *s. c.* 73 Am. Dec. 713, 717.

tions."[1] Reasoning from these propositions, the Supreme Court of Florida, speaking through Dupont, J., have said: "It would seem that, where the company undertakes to depart from or add to the original object or design, as set forth in the articles of association, or charter of incorporation there is this manifest difference between a simple partnership and an incorporated association: in the former, the assent of the individual member is not to be assumed — it is to be affirmatively established by positive proof; in the latter his assent will be presumed, unless he affirmatively proves his dissent. The ground of difference will be obvious to any reflecting mind. In the former case, the association being usually limited to a few members, they are generally competent to act in mass; whereas, the latter being composed of numerous individuals residing in remote localities, they are constrained, by the very necessity of the case, to speak through a conventional medium, viz., an organized majority. If this were not so, then would great inconvenience arise whenever it should become necessary for the interest of the association to vary from or add to the objects of the original enterprise. How would it ever be possible to obtain the express assent of each corporator? In many cases their particular localities would be unknown, and, if originally known, may have been changed from place to place. If this were not so, then, in every case of the decease of a stockholder, the corporation could accept no alteration of its charter, however such alterations might promote its interest and the consequent interest of each individual corporator, without reducing the original capital by the amount of stock standing in the name of the deceased; for it would not be pretended that the executor or administrator would have the authority, in such case, to assent, however clear it is that he would have the right to dissent, from the attempt to involve the estate in the new enterprise. Again, if this were not so, the rights and interests of the creditors would be at the mercy of the corporation; for, upon discovering that the prosecution of the original design of the charter had involved it in debt, and that its further pursuit was likely to prove unprofitable and disastrous, in order to absolve its members from liability for any further calls, it would only be necessary to obtain from the legislature an alteration of the charter, accepted by a meeting of stockholders composed of a bare quorum, under the provisions of the charter; and, as each individual might be sued upon his subscription, he would plead a want of express assent, and, unless it could be affirmatively proved that he was present at the meeting, he would be released, and the creditors defrauded of their just rights. But how is the fact of his presence to be

[1] 1 Kyd Corp. 422; Martin *v.* Pensacola &c. R. Co., 8 Fla. 370; *s. c.* 73 Am. Dec. 718.

proved? Who is the witness who will prove that he was at the meeting and consented to the alteration? The case before us fully illustrates these views; for, of all the witnesses interrogated, none could remember whether or not the defendant was present at the meeting which accepted the provisions of the internal improvement act, which, it is alleged, made a material alteration of the object contemplated in the original charter. And yet he may have been present, consenting to the act of acceptance, and, for the lack of this proof, he is to be absolved from his liability on his subscription, and the creditors, contractors, and laborers, who have given credit in part upon the faith of his subscription, to be deprived of their just rights; and this, too, without the slightest pretense that any injury or loss has or was likely to accrue to him from the alleged alteration. . . . The individual subscribes to the contract, with the distinct knowledge and understanding that its terms may be varied at any time by a concurrence between a majority of his associates and the legislature, and that, too, without his assent and in defiance of his dissent. Nay, he subscribes with the distinct knowledge that, with such concurrence, the terms of the charter may be totally altered, so that the corporation may be authorized to embark in new enterprises wholly and essentially different from those originally contemplated, and that his only remedy is to dissent and withdraw from the association. With these distinguishing features, can it be seriously contended that the mere subscription to the stock of a corporation stands upon the same footing and is to be governed in all respects by the general law of contracts as applicable to private or individual agreements?" The court therefore held that no error was committed in giving the following instruction, in an action by a corporation against its shareholder for an assessment on his stock: "That the defendant must show that he made timely objection to the acceptance of the internal improvement act; and the presumption is, in the absence of proof to the contrary, that he assented to the action of the stockholders who unanimously accepted the act; and especially is the presumption proper where the company has contracted debts to large amounts before any objection is made." [1]

§ 100. Instances under the Foregoing Rules. — An act of the legislature, in addition to a former act, creating a corporation for the

[1] Martin *v.* Pensacola &c. R. Co., 8 Fla. 370; *s. c.* 73 Am. Dec. 713. "While it is true that each corporator may object to the repeal or to any material modification of the provisions of the charter granted for other than municipal purposes, and constituting a legislative contract protected by the constitution of the United States, yet, in the absence of complaint, acquiescence in the change may be inferred, and ultimately its acceptance by the corporators." Western &c. R. Co. *v.* Rollins, 82 N. C. 523. Compare Mills *v.* Williams, 11 Ired. L. (N. C.) 558.

management of a trust fund, was passed without the knowledge or request of the corporation, and was never adopted by any direct vote; but the corporation, having elected certain officers, provided for by the act in addition, and such officers having exercised the powers thereby conferred on them for nearly ten years, — it was held that these proceedings were equivalent to, or sufficient evidence of, a formal assent or adoption by the corporation.[1] - - - - Previous to the passage of the Ohio general railroad act of February 11, 1848, a railroad company was chartered by a special act of the legislature, which empowered the directors to transact all the business of the company, but did not expressly authorize subscriptions to the capital stock in real estate. This privilege was conferred by § 14 of the act of 1848, upon all railroad corporations then existing that might accept the power so conferred. After the passage of that act, the directors entered on the records of the company a resolution that *subscriptions* to the capital stock might be made in *real estate*. The company then received real estate subscriptions to its stock, and sold and conveyed the same to *bona fide* purchasers with the knowledge of such subscribers, and without objection on their part, until many years after, when the stock had become worthless, and the enterprise for which the company was organized had been abandoned. It was held, that, in a suit by a subscriber against a purchaser from the company, to recover back the land conveyed by him to the company on such subscription, proof of the exercise of the privileges conferred by the act of 1848, upon the company, under a resolution of the parties to the suit, was sufficient evidence, as between them, that the company had accepted the powers conferred in that section, and was thereby authorized to take and convey land received on subscription to its capital stock.[2] - - - - Where a corporation was organized under an act of the legislature passed in 1859; and an amendatory act, the acceptance of which was drawn in question, was shown to have been drawn up by the attorney of the corporation, and its passage procured upon the application of at least a portion of the directors; and it also appeared that the board of directors authorized the opening of books of subscription to the guarantee fund, provided for by the amendment, at different times after the subscription which was drawn in question; and, also, that, at various times, the by-laws of the company recognized this subscription by regulating the rate of interest to be paid on the same, and the date at which computation commenced; — these acts were held to operate as an estoppel against the corporation, and to furnish evidence from which an acceptance of the amendment might be presumed.[3] And this, although

[1] Third School District in Blandford *v.* Gibbs, 2 Cush. (Mass.) 39.

[2] Goodin *v.* Evans, 18 Ohio St. 150.

[3] Sumrall *v.* Mut. Ins. Co., 40 Mo. 27.

as already seen[1] the *directors* of a corporation have no power, in the absence of statute, to do or consent to anything which changes the constituent character of the corporation, because their office is merely that of business managers. - - - - On a somewhat similar principle, where the charter of a railroad company contains a provision for obtaining title in case any person shall own any private right or interest in any of the streets or avenues over or upon which the railroad is authorized to be laid, by accepting such a charter, the grantees must be deemed to have conceded that the nature of the improvement calls for a new assessment of damages, or must have stipulated to make such an assessment in consequence of the benefits acquired by them under their act.[2]

§ 101. Estoppel to Deny Acceptance of Amendment.— As hereafter seen, the person who contracts with a corporation or with persons claiming to be a corporation, by its corporate name, becomes estopped to deny the corporate existence, when sued upon the contract.[3] Upon a similar theory one who contracts with a corporation, acting under an amended charter and by its amended name, will not be heard to complain that the amendment has not been properly accepted by the corporation.[4] This estoppel works against the corporation, as well as in its favor. If, therefore, a statute is passed creating new powers, and providing that any existing corporation may accept it, and that, on filing their acceptance, that part of their charter which is inconsistent with the act shall be repealed, and a corporation assumes to act under the statute and exercise the powers, though without filing the required acceptance, they cannot exonerate themselves from responsibility upon contracts made in the exercise of such powers, by objecting that they had not filed the evidence required by the statute to evince their decision to accept it. Although a corporation cannot vary from the object of its creation, and persons dealing with it must take notice of whatever is contained in the law of its organization, nevertheless, in cases in which a corporation acts within the range of its general authority, it may be bound, though failing to comply with some formality or regulation which should not have been neglected, but has been.[5]

[1] *Ante*, § 86.

[2] People *v.* Law, 34 Barb. (N. Y.) 494. See also Beals *v.* Benjamin, 29 How. Pr. (N. Y.) 109.

[3] *Post*, § 518, and Ch. 184.

[4] Eppes *v.* Mississippi R. Co., 35 Ala. 33.

[5] Zabriskie *v.* Cleveland &c. R.

Where an amendment to a charter of a private corporation is enacted by the legislature, upon conditions which are to be accepted in full of all demands which the corporation has against the State, if the conditions are so accepted by the governing body, pursuant to the terms of the grant, by a *formal instrument of acceptance*, such acceptance will create a binding contract between the State and the corporation, which the corporation can not thereafter avoid or set aside, on the ground that it was executed by its governing body in ignorance of the real nature and extent of their rights against the State.[1]

§ 102. **View that Objection can only be raised by Quo Warranto, etc.** — Where the amendment is such that it does not substantially change the character or objects of the corporation, a member of the corporation, when sued upon his stock subscription, or, in case of a mutual fire insurance company, upon his premium note, cannot set up the amendment as a defense to the action; he cannot object to the legality of the amendment in this collateral way; he must do it, if at all, in a direct proceeding.[2]

§ 103. **Amendment by Substitution of New Charter.** — The alteration of the charter may be as lawfully made by the substitution of a new charter as by an amendment of the old, provided such substituted charter be germane, and necessary to the objects and purposes for which the company was organized.[3] It has been held that a statute which in form is a new charter of an existing corporation, which does not purport to be an amendment of the old charter, but which contains precisely the same title, and which embodies most of the provisions of the old charter with the addition of certain new provisions, is to be treated merely as an amendment of the old charter, — the court, upon an examination of the terms of the new act, being of opinion that such was the legislative intent.[4]

Co., 23 How. (U. S.) 381. Compare Congregational Society *v.* Curtis, 22 Pick. (Mass.) 320.

[1] St. John's College *v.* Purnell, 23 Md. 629.

[2] Hope Mut. Fire Ins. Co. *v.* Beckmann, 47 Mo. 93. For a similar expression, see Chubb *v.* Upton, 95 U. S. 665; *ante*, § 80.

[3] Sprigg *v.* Western Tel. Co., 46 Md. 67.

[4] Hope Mut. Fire Ins. Co. *v.* Beckmann, 47 Mo. 93.

§ 104. Objections by Third Parties: Contractors.— If the legislature and the corporation concur in changing, repealing or surrendering the charter of the corporation, contractors with the corporation have no standing to object, provided their contracts are left intact and their legal remedies preserved.[1]

§ 105. How Minority are protected in England.— In England, where in theory of law the Parliament is supreme, and not subject to any judicial checks whatever, the Court of Chancery has, by indirection, found a means to protect the minority of the shareholders of a company against changes in the contract afforded by the constating instruments, effected by Parliament on the petition of the majority, — by restraining the majority, on a bill in equity filed by the minority, from *applying the funds* of the corporation in procuring from Parliament the passage of an act changing its objects and purposes.[2]

[1] Houston *v.* Jefferson College, 63 Pa. St. 428.

[2] Bagshawe *v.* Eastern Counties R. Co., 7 Hare, 114; Lancashire &c. R. Co. *v.* Northwestern R. Co., 2 Kay & J. 293.

CHAPTER V.

CHARTERS GRANTED BY THE COURTS.

§ 110. Devolving the power of creating Corporations on the Courts.— In the absence of a provision in the constitution to that effect, the legislature of a State has no power to authorize the judicial courts to grant special charters of incorporation. The reason is that, where the constitution of the State vests the legislative power in the general assembly, it is not competent for that body to delegate it to another department of the government.[1] The legislature may, however, even in the absence of a direct constitutional authorization, prescribe by general laws the conditions under which, and the purposes for which corporations may be organized, and may devolve upon the judicial department of the government the execution of those laws, by examining the charters and determining whether they are in compliance with law, and if so, passing a decree of incorporation.

[1] State *v.* Armstrong, 3 Sneed (Tenn.), 634; Ex parte Chadwell, 59 Tenn. 98.

In all these cases the distinction lies between *creating* and *organizing* corporations. In the absence of an explicit constitutional authorization to the contrary, only the legislature can create corporations; without the aid of such an authorization it may, however, empower the judicial courts to organize them under a general law, provided there is no prohibition in the constitution which disables the legislature from devolving *ministerial duties* on the judicial courts.[1] The theory is that, in such a case, the legislature merely uses the courts for the purpose of giving *legal form* to the corporation, and that the act required by the statute to be done by the courts is not an act involving even judicial discretion, but is a purely ministerial act, in such a sense that its performance could be compelled by *mandamus*.[2] Accordingly, it has been held that the legislature may, in the absence of a direct constitutional authorization, provide by law for the creation of village, town or city corporations, by presenting a petition therefor to the *county court*, that body having no discretion to refuse the petition when it conforms to the statute, but being required merely to spread it upon its minutes, which done, the corporation becomes, *ipso facto*, legally organized.[3] Under the Tennessee act of 1871 authorizing the *chancery courts* to grant letters of incorporation, it was held that such courts had no power to organize a corporation for any purpose not authorized by general law; since this would be to create corporations, which was an attribute of legislative power, and not merely to organize them.[4] In other words, the action of the court extends no further than to furnish evidence of organization.[5]

§ 111. Objects for which the Courts may Grant Charters in Pennsylvania. — In a case where a charter was applied for before him in 1871,[6] Mr. Justice Paxson, of the Philadelphia Court of Common Pleas, afterwards a justice of the Supreme Court of Pennsylvania, collected from the statute laws of that State and catalogued the several

[1] See the reasoning in Ex parte Chadwell, 59 Tenn. 98; also Ex parte Burns, 1 Tenn. Ch. 83; Railroad Co. *v.* Johnson, 72 Tenn. 333; Greenville &c. R. Co. *v.* Johnson, 64 Tenn. 332.

[2] Franklin Bridge Co. *v.* Wood, 14 Ga. 80.

[3] Morristown *v.* Shelton, 1 Head (Tenn.), 24.

[4] Ex parte Chadwell, 59 Tenn. 98.

[5] Greenville &c. R. Co. *v.* Johnson, 64 Tenn. 332.

[6] Re Charter of Philadelphia Artisans' Institute, 8 Phila. (Pa.) 229.

objects for which the Court of Common Pleas was authorized by law to grant charters of incorporation. These were: "1. Associations for literary, charitable or religious purposes, benevolent societies or associations, fire-engine or hose companies.[1] 2. Associations for the promotion of science or agriculture, cemetery or burial associations, societies for the detection of thieves and the recovery of stolen property.[2] 3. Musical societies and associations.[3] 4. Mutual savings fund, loan or building associations.[4] 5. Associations for the purpose of insuring horses, cattle and other live stock against loss by death, from disease or accident, or from being stolen; water, hook and ladder companies, building associations, musical clubs or associations, teachers' institutes or associations, hotel companies, skating parks; associations and clubs for the advancement of athletic sports, including base ball clubs; and fire insurance companies.[5] 6. Saving fund associations, or societies for the accumulation of funds and the distribution of the same among other members, without banking or discounting privileges." [6]

§ 112. Proceedings to Obtain such Charters must be Public. — In one case the Philadelphia Common Pleas refused a charter to a religious society, on the ground that the charter had not been exposed to inspection by the public, but that affirmative means had been taken to prevent such inspection, — the court reasoning that, although this is not specially directed by the act, yet the provision requiring an advertisement of the proposed application indicates that publicity was the intention of the legislature.[7]

§ 113. Requisites of Charter submitted to Court under Pennsylvania Statute.—In the case before Mr. Justice Paxson, referred to in a preceding section,[8] the learned judge, in view of the very crude manner in which charters were drawn which were submitted to the court for approval, restated at length the essential features which every charter should contain, citing local decisions in support of the different features which he catalogued. They were as follows: 1. The

[1] Citing Penn. Act of Oct. 3rd, 1840; Purd. Dig. Penn. Stat. 196, pl. 11; P. L. Penn. 5.

[2] Penn. Act of Feb. 20th, 1834; Purd. Dig. 197, pl. 15; P. L. 90.

[3] Penn. Act of Apr. 6th, 1859; Purd. Dig. 197, pl. 16; P. L. 377.

[4] Penn. Act of Apr. 12th, 1859; Purd. Dig. 129, pl. 1; P. L. 544.

[5] Citing Penn. Act of March 26th, 1867; Purd. Dig. 1456, pl. 3; P. L. 44.

[6] Penn. Act of Apr. 12th, 1867; Purd. Dig. 1456, pl. 4; P. L. 70.

[7] Re Charter of Church of Holy Communion, 14 Phila. (Pa.) 121.

[8] Re Charter of the Philadelphia Artisans' Institute, 8 Phil. (Pa.) 229.

membership must be restricted to citizens of this commonwealth.[1] 2. The name of the proposed corporation must be stated, and said name should be entirely distinctive from that of any other incorporation in the same locality.[2] 3. The objects of the association must be clearly defined, so as to satisfy the court that they are within the meaning of the law.[3] 4. The articles should clearly define the rights and duties of the members.[4] 5. The conditions under which the parties propose to associate. 6. The location where said corporation is intended to be situated, or its principal business transacted. 7. That all by-laws to be adopted by said proposed corporation for its government shall be consistent with the constitution and laws of the United States, the constitution and laws of this commonwealth, and with the proposed charter. 8. Any clause providing for an amendment to the charter must set forth that said amendment shall be made in conformity with law. 9. If the power of expulsion is introduced, the charter must clearly define the causes for which a member may be expelled. An indefinite or vague statement of the offense is not sufficient. The court will not approve a charter which gives a majority of the association power to expel any member "guilty of any offense against the law." Any such or kindred expression is too general.[5] 10. In charters of building associations, the number and value of the shares proposed to be issued must be stated. 11. In charters of benevolent societies, there must be a clause restricting the application of their funds to the object declared to be the purpose of their association. 12. In all charters where a cash capital is provided for, the amount of such capital must be stated, as also the number and value of the shares. 13. Every charter must contain a limitation of the amount of real and personal estate to be held by such corporation. The limitation of real estate must not exceed the maximum prescribed by the act of Assembly; and the limitation as to the personal estate must be reasonable, taking into view the objects of the association, the court reserving the right to approve the latter in its discretion. 14. Every charter should be written upon one sheet of paper or parchment. Interlineations in a charter are not proper, and if the same occur in a material part, the charter will be rejected.[6]

[1] Citing Butchers' Beneficial Association, 35 Pa. St. 151.

[2] Citing 6 Pittsb. Leg. J. 161.

[3] Citing National Literary Association, 30 Pa. St. 150.

[4] Citing German Genl. Beneficial Association, 30 Pa. St. 155.

[5] Citing Butchers' Beneficial Association, 38 Pa. St. 298; Beneficial Association of Brotherly Unity, *Id.* 299; Butchers' Beneficial Association, 35 Pa. St. 151; Commonwealth *v.* St. Patrick's Benevolent Society, 2 Binn. (Pa.) 448; Commonwealth *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469.

[6] Re Charter of Philadelphia Artisans' Institute, 8 Phila., (Pa.) 229.

§ 114. Requisites of Charter under Pennsylvania Act of 1874.— These are: "1. The name of the corporation. 2. The purpose for which it is formed. 3. The place or places where its business is to be transacted. 4. The term for which it is to exist. 5. The names and residences of the subscribers and the number of shares subscribed by each. 6. The number of its directors and the names and residences of those who are chosen directors for the first year. 7. The amount of capital stock, if any, and the number and par value of shares into which it is divided."[1] This statute has been held mandatory.[2]

§ 115. Reasons for which Charters have been Refused.— Charters have been refused in that State where the *object* of the association was *not sufficiently stated*, — where the charter, for instance, after enumerating four distinct purposes for which the association was formed, went on to say, "for such other purposes as may be agreed upon by the association in future." 2. Where the membership was not confined to *citizens* of the commonwealth. 3. Where there was no limitation of the amount of *real and personal estate* to be held by the proposed corporation. 4. Where *amendments* to the charter were not required to be made with the approval of the court. In another case the approval of a charter was denied where the membership was not restricted to citizens of Pennsylvania, and where there was a provision that membership should be forfeited upon enlistment in the army or navy, the latter clause being against public policy. Paxson, J., said: "A corporation which is a creature of the law ought not to proscribe its members for aiding the government which creates and protects it."[3] So, where the charter of a society called the Butchers' Benevolent Association was presented to the Supreme Court of Pennsylvania for approval, several defects were found in it which prevented the court from approving it. Said Lowrie, C. J.: "It allows of any *by-laws* that are not inconsistent with itself; while we cannot allow any, except under the restriction that they shall be consistent with the constitution and laws of the State and of the Union. Again, it allows of membership to *citizens* of the United States, when it ought to be confined to citizens of this State."[4]

Citing Alexander Presbyterian Church, 50 Pa. St. 154; United Daughters of Cornish, 35 Pa. St. 80.

[1] Pennsylvania Act of April 29th, 1874.

[2] Re Charter of Stevedores' Beneficial Association, 14 Phila. (Pa.) 130.

[3] Re Charter of Rev. David Mulholland Benevolent Society, 10 Phila. (Pa.) 19.

[4] Butchers' Beneficial Association, 35 Pa. St. 151.

§ 116. Charters Refused which contain an Indefinite Power of Expulsion. — Charters have been refused which contained an indefinite power of expelling members.[1] Thus, the charter of the Butchers' Beneficial Association, when first presented to the Supreme Court of Pennsylvania, was rejected, on the ground, among others, that it allowed the association to expel members who should be guilty of actions which might injure the association. This the court could not approve, because it gave to the association an indefinite power over its members. The court reasoned that it is incompatible with the spirit of our institutions to clothe any body with such indefinite power over its members, arguing that it was equivalent to socialism and was a rejection of all individual rights within the association. The court held that it was proper to found the right of expulsion on the fact of a member having been convicted of crime on a trial in court.[2] So, where there was an article which provided, — "Should any member of this association be guilty of *unprofessional indecorum* or *ungentlemanly conduct*, he may be reprimanded, suspended, or expelled at the discretion of two-thirds of the members present at any stated meeting: *Provided*, however, that charges and specifications in writing shall have been read by the Secretary and referred to the Board of Directors, who shall investigate or try the same, as provided for in the by-laws, and report to the association," etc., — this article was held objectionable on account of the vague description of the offenses for which members might be expelled, and because it contained no proper provision for the trial of the offending party.[3]

§ 117. Further of this Subject. — The Supreme Court of Pennsylvania has refused to approve a charter for the incorporation of an association, where the articles contained the statement that any member might be expelled who should *commit any misdemeanor*, or any other act that might prove injurious to his character or standing as a member of the association. The court did not object to the word misdemeanor, although that was criticised as authorizing expulsions for petty offenses; but the court said: "'Acts injurious to character or standing as a member' is no definition of any offense. We might as well sum up all criminal law by the expression, 'acts contrary to the general welfare.' Such expressions state well enough the *principle* of law; but they state no law; for every law is grounded on some principle, and is itself a definite

[1] Butchers' Beneficial Asso., 38 Pa. St. 298; Beneficial Asso. of Brotherly Unity, 38 Pa. St. 299.

[2] Re Charter of Butchers' Beneficial Asso., 35 Pa. St. 151.

[3] Re Charter of Journalists' Fund, 8 Phila. (Pa.) 272.

statement of some act or special class of acts, which are declared to be approved or condemned by the principle. Under the principle here objected to, the majority may expel a member for almost any act, and thus members are left without any rights that the majority may choose to withhold. Too earnest a claim of rights, or too earnest a performance of social duty, may thus become a ground of expulsion, if the majority pleases." [1] On like ground that court has refused to approve a charter of incorporation for a beneficial society which gave a majority of the society power to expel any member who should be "*guilty of any offense against the law.*" The court regarded it as "the loose expression of their scrivener." Lowrie, C. J., said: "Do they really mean that, if a member should happen to swear a little, or enjoy some Fourth of July too freely, or leave his horse and wagon in the street without an attendant, or not clean off his pavement as the law requires, — he shall be liable to expulsion? We are sure they do not mean all the little offenses of omission and commission which the law provides against; for many of them are totally irrelevant to the purposes of their association. But they have taken this way of defining offenses that may lead to expulsion, and the definition is so very general that it puts the rights of all, not under the protection of a constitution, but under the mere will of a majority. If they had provided that only those who are without sin among them, should be allowed to vote for the expulsion of a member, this might have been an important limitation of the expulsive power. A constitution that puts all power over rights into the hands of the majority, is really no constitution at all. It is leaving to force the free exercise of its power, unrestrained by rules of reason. Many members whose sickness may become expensive might easily be disposed of under this rule." [2]

§ 118. Charters Refused containing Powers not Specified in the Statute. — The Supreme Court of Pennsylvania have ruled that charters submitted to the courts for approval should be denied where they contain powers not specified in the statute,[3] — reasoning that the court cannot confer corporate powers, which would be an act of legislation.[4] Accordingly, where the constitution of a medical college, submitted to the Supreme Court, contained a clause authorizing the college to *confer degrees* in medicine upon students and others, the court declined to certify it.[5] So, the Philadelphia Common Pleas refused to in-

[1] Butchers' Beneficial Association, 38 Pa. St. 298.

[2] Beneficial Association of Brotherly Unity, 38 Pa. St. 299.

[3] Re Medical College, 3 Whart. (Pa.) 455.

[4] To the same effect see Com. *v.* Conover, 10 Phila. (Pa.) 55.

[5] Re Medical College, *supra.*

corporate a *club* with the provision in its charter that each *share* should be entitled to one *vote*, because the governing statutes only authorized the court in such a case to confer such immunities as by the common law were necessary to constitute a corporation.[1]

§ 119. Charters Refused with Power to confer Degrees. — As already stated, the Supreme Court of Pennsylvania, in the absence of a direct statutory authorization, refused to approve the charter of a medical college, which charter conferred upon the corporation the power to confer degrees on students and others.[2] In a later case, and having reference to the terms of a later statute prescribing the standard of qualification for practitioners of medicine,[3] the court refused a charter to an institution for instruction in electricity as a curative agent, with power to confer *degrees in medicine or electricity*, — proceeding upon the view that such a qualification for the practice of medicine did not meet the standard required by the statute.[4]

§ 120. Charters Refused for Mutual Marriage Benefit Associations.— Charters have been refused in Pennsylvania for the formation of mutual marriage benefit associations, the objects of such associations being against public policy.[5]

§ 121. Charters Refused containing By-laws.— A charter offered for approval has been rejected on the ground that it contained provisions for the internal management of the corporation, which were properly the subject of by-laws.[6]

§ 122. Charters Refused because not Written on a Single Piece of Paper.— A critical nicety in objecting to the charters handed up by certain classes of people has led to the conclusion that a charter ought to be refused on the ground that it was not written upon a single piece of paper or parchment,— the court not explaining what should be done in case the charter should contain too many words to be written on a single sheet. The court said: "This charter is written upon a number of sheets of paper fastened together by ordinary paper fasteners. All charters should be written upon a single piece of paper

[1] Com. *v.* Conover, 10 Phila. (Pa.) 55; Compare St. Mary's Church, 7 Serg. & R. 538.

[2] Re Medical College, 3 Whart. (Pa.) 455.

[3] Penn. Act of March 24th, 1877; Purd. Dig. 2151.

[4] Re Charter of American Electropathic Institute, 14 Phila. (Pa.) 128.

[5] Re Mutual Aid Asso., 15 Phila. (Pa.) 625; Re Helping-Hand Marriage Asso., *Id.* 644.

[6] Re Charter of Stevedores' Beneficial Association, 14 Phila. (Pa.) 130.

or parchment, and the courts have frequently refused to approve them unless presented in this form. The observance of this has not been uniformly required, but we think it much the better practice, and shall hereafter require it."[1]

§ **123. Charter Under § 1676 of Georgia Code.**— Persons desirous of being incorporated, under § 1676 of the Georgia code, must specify the object of their association, the particular business they propose to carry on, the place at which they propose to carry it on, and the amount of capital to be employed by them in such business, actually paid in; and unless these particulars are disclosed in the application, the charter will not be granted. The court will not countenance a petition which is so framed as to mask the objects of the applicants.[2]

§ **124. Referring the Application to an Amicus Curiæ.**— In Missouri, some of the courts are in the habit, upon their own motion and without any statutory direction, of referring such an application to a member of the bar as *amicus curiæ*; and it has been held in that State that it is competent for the court to allow the *amicus curiæ* a reasonable compensation for his services, to be taxed as costs against the proposed incorporators.[3]

§ **125. No Appeal from Decree refusing.**— Under the Tennessee act of 1871, authorizing the chancery courts to grant letters of incorporation, no appeal lay to the Supreme Court from the refusal of a chancery court to grant such letters.[4]

§ **126. Charters Amended by the Judicial Courts.** — Statutes have existed in Pennsylvania empowering the judicial courts to grant amendments to charters enacted by the legislature. An instance of this occurs in a case decided in 1822.[5] As early as 1791 the legislature of Pennsylvania passed a statute of this kind. Corporations which were created under special statutes prior to that time could not have their charters amended in this way without a special enabling act. Such an act was granted by the legislature in the case of a corporation called the Roman Catholic Society Worshiping at St. Mary's Church in Philadelphia. In the interpretation of this statute the court held that amendments proposed by a corporation are not to be considered as the

[1] Re Charter of Stevedores' Beneficial Association, 14 Phila. (Pa.) 130.

[2] Re Deveaux, 54 Ga. 673.

[3] Re St. Louis Institute, 27 Mo. App. 633.

[4] Ex parte Chadwell, 59 Tenn. 98.

[5] Case of St. Mary's Church, 7 Serg. & R. (Pa.) 517.

act of the corporation, merely because they are offered to the inspection of the attorney-general and the Supreme Court under the seal of the corporation, but that the court may inquire into the authority by which the seal was affixed. The court declared, as the principle to govern such an inquiry, that, in corporations where there are different classes of members, the majority of these classes must consent before the charter can be altered, in the absence of a provision in the charter itself otherwise providing. The court also held that, where the trustees of a corporation consist of three clerical and eight lay members, and one of the clerical members has been excluded from the board by a resolution of the lay members without authority, — it is not competent for the remaining members to submit resolutions for the alteration of the charter.[1]

§ 127. What Body Assent to Amendments by Judicial Courts. — This decision established the doctrine that, under statutes of Pennsylvania authorizing the courts to grant amendments to the charters of certain corporations, it is essential to the granting of the amendment that it should appear to the court that the application is the result of *corporate action*, and not the action of the individual members.[2] It has also been ruled in that State that, where it is denied that a proposed amendment has been adopted by a corporation, the court before approving it will direct a *stock vote* to be taken.[3]

[1] Case of St. Mary's Church, *supra*. From this last point Gibson, J., dissented. As to the amending of charters so as to bind dissenting members see *ante*, § 66, *et seq.*

[2] St. Mary's Church, 6 Serg. & R. (Pa.) 498.

[3] Matter of Mercantile Library Co., 2 Brews. (Pa.) 447.

CHAPTER VI.

ORGANIZATION UNDER GENERAL LAWS.

ARTICLE I.

PURPOSES FOR WHICH INCORPORATION PERMITTED.

SUBDIVISION I. Examples from Various Statutes.

§ 132. Statutes authorizing the Formation of Corporations. — Statutes are multiplying in many of the States extending the objects for which corporations may be formed. These, in some instances, take the form of amending statutes already in existence; in others they furnish within themselves an entire scheme of incorporation.[1] In this subdivision an attempt is made to exhibit the purposes for which corporations may be formed under general laws by extracts from the legislation of several of the States: Alabama, California, Colorado, Illinois, Indiana, Missouri, Ohio, and New York. A more striking illustration could not be given of the fantastic patchwork of which American legislation consists. It suggests the reflection whether it would not be better in all cases to enact a consolidated statute, enumerating all the purpose for which corporations have hitherto been allowed in the particular State, either under general or special laws, and to enact that corporations may be formed for *such* purposes and for any other purposes for which individuals may lawfully associate,[2] — leaving it to be ascertained in every

[1] In California a recent statute authorizes the formation of corporations to act as executor, administrator, guardian of estates, assignee, receiver, depositary, or trustee; Act March 5, 1887; L. 1887, c. 26, p. 21. In Colorado, to warrant or insure the title to real property, authorized. Act April 7, 1887; L. 1887, p. 234. In Minnesota the provisions of the General Statutes of 1878 (Gen. Stats. Minn. ch. 34, § 31), for the incorporation of railway and other companies "which require the taking of private property or any easement therein," have been amended by including therein companies for building, etc., "pneumatic tube lines, subway conduits for the passage, operation and repair of electric and other lines or pipes." Act March 7, 1887; Gen. L. 1887, c. 161, p. 269. In Dakota Territory the provisions of the civil code relating to the formation of private corporations were amended in 1887, by specifying what business such corporations might pursue. Dakota Act of Feb. 7th, 1887; Dak. Laws 1887, chap. 35, p. 84.

[2] As in § 164, *post*.

case where the lawfulness of the purpose is not fixed by an express statute, to be determined, on petition to a court of general jurisdiction, subject to an appeal to a court of last resort, either by the applicants or by the State, whether the incorporation shall be allowed. In such case the State's attorney should have notice of the application, and it should not be allowed to take the form of a mere *ex parte* proceeding, in which no one save the petitioners is interested. In the following sections the necessity of condensation has induced a departure from the exact language of the statutes, but the substance has been given.

§ **133. Agricultural Fairs.**— All county societies which have been or may hereafter be organized are declared bodies corporate and politic, and as such shall be capable of suing and being sued, and of holding in fee simple such real estate as they have heretofore purchased or may hereafter purchase as sites whereon to hold their fairs.[1]

§ **134. Alumni.**— The alumni of any college or university, or of one or more colleges of any university, located in this State, may be incorporated.[2]

§ **135. Avenues.**— Companies may be incorporated in any county having not less than one hundred thousand inhabitants, for the purpose of constructing avenues in such county.[3]

§ **136. Banks.** — Corporations may be formed to carry on the business of banking without the issue of bills or notes for circulation.[4] - - - - Any number of persons, not less than three, may be incorporated as a bank of discount and deposit.[5] - - - - On a ratification of this act by a vote of the people in accordance with the constitution of this state, it shall be lawful to form banks and banking associations for the purpose of discount and deposit, and to buy and sell exchange, and do a general banking business, excepting only issuing bills to circulate as money, and shall have power to loan money on personal and real security and accept and execute trusts.[6] - - - - Any number of persons, not less than five, may form themselves into

[1] 1 Rev. Stat. Ohio [Giauque], 1890, § 3700.

[2] 3 Rev. Stat. New York [Banks & Bros. 8th ed.], p. 2029.

[3] 1 Rev. Stat. Ohio [Giauque], 1890, § 3822.

[4] 1 Code of Ala. 1886, p. 369, § 1521.

[5] Gen. State Colo. 1883, p. 189, § 271.

[6] Laws of Ill. 1887, p. 89.

a corporation, as a bank of discount and deposit.[1] - - - - Any five or more persons may be incorporated as a bank of deposit or discount, or of both deposit and discount, under any name or title designating such business.[2] - - - - Any number of persons may associate to establish offices of discount and deposit, they must execute a certain certificate.[3] - - - -

§ **137. Bar Associations.** — Any nine or more attorneys or counselors of the Supreme Court of this State, who wish to cultivate the science of jurisprudence, to promote reform in the law, to facilitate the administration of justice, elevate the standard of integrity, honor and courtesy in the legal profession, etc., may be incorporated.[4]

§ **138. Breeding Domestic Animals.** — Any number of persons, not less than twenty-five, residing in any county of this State, who collectively shall own property of not less than $50,000 in value, $20,000 of which shall consist of insurable live stock which they desire to have insured, may form a corporation for the purpose of mutual live stock insurance against loss by death from any cause.[5] - - - - Any number of persons not less than five may form a corporation to raise, improve and breed horses.[6] - - - - Any number of persons, not less than thirteen, may associate and form a corporation for the purpose of importing, raising and improving and breeding poultry, small birds, domestic and pet animals, and fish culture, and collecting and disseminating useful knowledge, concerning them.[7] - - - - Any number of persons, not less than five, may form a corporation to import, raise, improve and breed domestic animals.[8]

§ **139. Bridges.**— Any number of persons may form themselves into a corporation to construct and own a bridge across any river, creek, or other water-course.[9] - - - - Any number of persons may be incorporated to construct and own a bridge across any of the rivers and streams forming the boundary of the State of Indiana.[10] - - - - Any number of persons, not less than five, may

[1] Rev. Stat. Ind. 1888 [Myers & Co.], § 2684.

[2] Rev. Stat. Mo. 1889, p. 699, § 2743.

[3] 2 Rev. Stat. of New York [Banks & Brothers' 8th ed], p. 1522.

[4] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2031.

[5] Laws of Ill. 1887, p. 197.

[6] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2067.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2074.

[8] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2073.

[9] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3528.

[10] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3547.

incorporate themselves into a corporation to construct and own a bridge or causeway across any stream or channel of water, or adjoining bay, swamp, marsh or water, which it may be necessary to cross to form a continuous roadway.[1]

§ 140. Building and Loan Associations. — Three or more persons may be incorporated as a building and loan association.[2] - - - - Any number of persons not fewer than ten, after at least one hundred shares of stock have been subscribed for, may incorporate themselves for the purpose of organizing a building, loan fund and savings association.[3] - - - - Any number of persons, not less than five, may become incorporated as a mutual building, loan and homestead association for the purpose of building and improving homesteads and loaning money to the members thereof.[4] - - - - Any ten or more persons in any city or county in this State, who shall have associated themselves by articles of agreement in writing, as provided by law, for the purpose of forming a mutual saving fund, loan or building association, may be incorporated under any name or title designating such business.[5] - - - - Any number of persons, not less than nine, may associate and form an incorporated company to accumulate money to purchase real estate, erect buildings, make improvements on lands or pay off incumbrances thereon, or to aid its members in acquiring real estate, making improvements thereon, and removing incumbrances therefrom, and to accumulate a fund to be its members who do not obtain advances.[6]

§ 141. Building Towns. — Where any persons may have heretofore associated themselves together for the purpose of building a town within any county in this State, they may be incorporated.[7]

§ 142. Business Purposes: Mining, Manufacturing, Merchandising, etc. — Two or more persons, associating for the purpose of mining, quarrying or manufacturing, may be incorporated.[8] - - - - Corporations may be formed in the manner provided by this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money: Provided,

[1] 2 Rev. Stat. of New York [Banks & Brothers' 8th ed.], p. 1509.

[2] Code of Ala. 1886, vol. 1, p. 378, § 1553.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co], § 3407.

[4] 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 629.

[5] 1 Rev. Stat. Mo. 1889, p. 715, § 2808.

[6] 2 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1587.

[7] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3493.

[8] 1 Code Ala. 1886, p. 380, § 1557.

that horse and dummy railroads, and organizations for the purchase and sale of real estate for burial purposes only, may be organized and conducted under the provisions of this act: And provided further, that corporations formed for the purpose of constructing railroad bridges shall not be held to be railroad corporations.[1] - - - - Any three or more persons may be incorporated under any name or title designating such business for the following purposes: First, to carry on any kind of mining, mechanical, chemical, manufacturing, smelting, printing, coal oil or petroleum business; second, to encourage and promote agriculture and the improvement of stock, and for these purposes may establish fair grounds; third, to construct toll bridges; fourth, to erect hotels, halls, market houses, warehouses, exchange and other buildings, and for the purpose of purchasing, owning and renting buildings already erected; fifth, to build wharves, docks, grain elevators, levees, and to construct canals and embankments for the reclaiming of lands; sixth, to convey and transport persons and freights on land or water by any mode of conveyance whatever; seventh, to construct and operate horse railroads; eighth, to purchase and use fire engines, hose, hooks and ladders, and all other apparatus necessary or useful to prevent and extinguish fires; ninth, to supply any town, city, district, neighborhood, or village with gas or water; tenth, to establish steam or other ferries; eleventh, for any other purpose intended for pecuniary profit or gain not otherwise specially provided for, and not inconsistent with the constitution and laws of this State.[2] - - - - Three or more persons may form a corporation to carry on any kind of manufacturing, mining, mechanical or chemical business, or to furnish motive power to carry on such business; or to supply any city or village with water, or to form union stock yards and transit companies, and operating, maintaining and transacting the business incident to such companies; or to form grain elevator companies, and constructing, maintaining and operating elevators, and transacting the business incident thereto; or to form companies for the purpose of buying and selling dry goods, carpets, boots and shoes, millinery goods, fancy goods, or jewelry, in connection with the manufacture of such goods, and articles, into any articles for which they are suitable, and for the sale of such articles, when they are so manufactured.[3] - - - - Corporations may be formed for manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical, curative, mercantile or commercial purposes.[4]

[1] 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 609.

[2] 1 Rev. Stat. Mo. 1889, pp. 705, 706, §§ 2768, 2771.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3851.

[4] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1953.

§ 143. Camp Meetings. — Any number of persons, not less than fifteen, may incorporate themselves for the purpose of holding camp meetings for religious services.[1] - - - - Corporations may be formed to acquire residences for presiding elders of the Methodist Episcopal church and camp grounds for camp meeting purposes.[2]

§ 144. Canals. — Any number of persons may form themselves into a corporation to construct and own any canal hereafter built in this State, or to operate, repair and rebuild any canal or part thereof already constructed by agreement with the parties owning the same.[3]

§ 145. Cemeteries. — Any number of persons, not less than three, may be incorporated for the purpose of procuring and establishing a cemetery or place of sepulture.[4] - - - - A majority of the persons resident in any county, owning burial lots in any cemetery (public or private), wherein a portion of the lots are occupied for the burial of the dead, may have the same incorporated.[5] - - - - Any individuals, who may unite themselves together for the purpose of receiving donations of lands, or purchasing the same, for cemeteries, may be incorporated.[6] - - - - Any number of persons, not less than seven, may form a corporation for the purpose of procuring and holding lands to be used exclusively for a cemetery.[7] - - - - Private or family cemeteries may be incorporated.[8]

§ 146. Chambers of Commerce: Merchants' Exchanges: Boards of Trade. — Corporations may be formed for the formation and organization of chambers of commerce, boards of trade, mechanic institutes, and other associations for the extension and promotion of trade and commerce, or the advancement, protection and improvement of the mechanic arts and sciences.[9] - - - - Any number of persons, not less than ten, may incorporate themselves for the purpose of maintaining boards of trade, commercial or real estate exchanges, chambers of commerce, or other commercial organizations.[10] - - - -

[1] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3421.

[2] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1919.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3565.

[4] Gen. Stat. Colo. 1883, p. 218, § 379.

[5] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3589.

[6] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3832.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1935.

[8] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1945.

[9] 2 Deering's Annot. Code & Stat. of Cal., § 286.

[10] 2 Rev. Stat. Ind. 1888 [Myers & Co.], §§ 3518, 3519.

Any twelve or more persons may form a corporation commonly called board of trade or exchange, or a builder's exchange or association, for the purpose of fostering trade and commerce, etc.[1]

§ **147. Colleges.** — Any number of persons, who may desire to establish a college or seminary of learning, may incorporate themselves.[2] - - - - Any citizens, not less than ten, who desire to found and endow a *musical* college, school or academy, within this State may be incorporated.[3]

§ **148. Co-operative Associations.** — Any number of persons, not less than three nor more than seven, may be incorporated as a co-operative association for the purpose of prosecuting any branch of industry.[4] - - - - Any number of persons, not less than three, may associate and form an incorporation for the purpose of uniting their labor, capital and patronage, in any business or occupation on the co-operative plan.[5]

§ **149. Cruelty to Animals.** — Any five or more persons of full age, a majority of whom shall be citizens of this State, may form a corporation for the purpose of preventing cruelty to animals.[6]

§ **150. Cruelty to Children.** — Any five or more persons of full age, a majority of whom shall be citizens of this State, may form a corporation for the purpose of preventing cruelty to children.[7]

§ **151. Detective Associations.** — Any number of citizens, not less than ten, may form themselves into a corporation for the purpose of detecting and apprehending horse thieves, incendiaries and all other criminals against the laws of the State of Illinois.[8] - - - - Any number of persons, citizens of Indiana, not less than ten, may form a corporation to detect and apprehend horse thieves and other felons, and for mutual protection and indemnity against the acts of such horse thieves and felons.[9] - - - - Any number of persons, not less than fifteen, a

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p 2057.

[2] 2 Deering's Annot. Code & Stat. of Cal., p. 159, § 649.

[3] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2044.

[4] Ill. Laws of 1887, p. 134.

[5] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2045.

[6] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1932.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1931.

[8] Laws of Ill. 1887, p. 140.

[9] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3428.

majority of whom shall be residents of the State of Ohio, are hereby authorized to become incorporated for the purpose of apprehending and convicting horse thieves and other felons.[1] - - - - Any ten or more persons may form a corporation for the prevention of the stealing of horses, wagons, sleighs, harness, or robes.[2]

§ **152. Fencing Land.** — Any number of persons, not less than five, who are interested in closing under one general fence improved lands, used for cultivation, which are near a water-course and subject to overflow, or in doing any other work necessary to protect such lands and to secure the crops raised thereon, may be incorporated.[3]

§ **153. Ferries.** — Any three or more persons may form a company to conduct and manage a ferry.[4]

§ **154. Fire Companies.** — Any ten or more persons, residents of the State, may associate themselves together in a corporate capacity as a fire, hose, or hook and ladder company.[5]

§ **155. Fire Department Relief.** — Any fire department existing by authority of law in any city or county in this State having a population of fifty thousand inhabitants or over, can form a pension fund and relief association under the incorporation laws for benevolent associations to create a fund to pension retired firemen and to afford relief to members when sick, or who may become disabled, and to provide a fund for the relief of their families in case of their deaths.[6]

§ **156. Gaslighting.** — Any three or more persons may incorporate to manufacture and supply gas for lighting the streets and public and private buildings of any city, village or town, or two or more villages or towns, not over five miles distant from each other.[7]

§ **157. Guano: Fertilizers.** — Any five or more persons may form a corporation to mine, import and export guano and other fertilizers,

[1] 1 Rev. Stat. Ohio [Giauque], 1890, § 3709.

[2] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2072.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3465.

[4] 3 Rev. Stat. of New York [Banks & Bros. 8th ed], p. 1847.

[5] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2055.

[6] 1 Rev. Stat. Mo. 1889, p. 739, § 2887.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2075.

and to purchase or charter steam or sailing vessels, and to buy real or personal property to transact such business.[1]

§ 158. **Guaranty: Suretyship: Indemnity: Safe Deposit.**— Any number of persons, not less than three, may incorporate to carry on the business of suretyship, with authority to make loans on real estate and personal security; to receive cash deposits and pay interest thereon; to insure the fidelity of persons in places of trust; to receive valuables for safe-keeping; to act as agents for issuing certificates for shares of stock, and for the management of sinking funds; and to be sole and sufficient security.[2] - - - - Any five or more persons may form a company for the purpose of keeping safe valuable personal property and guarantying its safety.[3] Any number of persons, not less than eleven, may form an incorporated company to guaranty and indemnify those engaged in business and giving credit from loss and damage by reason of giving credit to those dealing with them.[4] - - - Any number of persons, not less than three, may form a corporation to insure owners of real estate, mortgages and others interested in real estate from loss by reason of defective titles, liens and incumbrances, and to insure loans of every and all kind.[5]

§ 159. **Gymnastic Purposes.**— Any number of persons not less than ten may form an incorporated society for gymnastic purposes.[6]

§ 160. **Health Resorts: Sanitariums: Medicines, etc.**— Three or more persons may form a corporation to carry on or conduct a health resort, hospital or sanitarium, to manufacture and sell chemicals and medicines, and to sell mineral waters.[7]

§ 161. **Horticulture.**— Associations of persons for horticultural purposes, whether State, District or County Associations, may be incorporated.[8]

§ 162. **Hydraulic Power.**— Any number of persons, not less than ten, being subscribers of the stock of any contemplated hydraulic com-

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2084.

[2] Sess. Laws Colo. 1889, p. 447.

[3] 2 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1604.

[4] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1719.

[5] Sess. Laws. Colo. 1887, p 234.

[6] 2 Rev. Stat. Ind. 1888 [Myers & Co.], 3464*a*.

[7] Indiana Acts 1889, p. 95.

[8] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3490.

pany, may be formed into a corporation for the purpose of constructing, maintaining and owning such hydraulic power.[1]

§ **163. Insurance.**— Corporations may be formed to insure lives, or persons or property against accident, or to insure against fire or against the perils and risks of the sea or of navigable streams.[2] - - - - Any number of persons, not less than thirteen, may incorporate to make insurance on dwelling houses, stores and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lightning and tornadoes, or either or any of said causes, and the risks of inland navigation and transportation.[3] - - - - Any number of persons, not less than twenty-five, residing in any county in this State, who shall collectively own property of not less than $50,000 in value, which they desire to have insured, may form an incorporated company for the purpose of mutual insurance against loss or damage by wind storms.[4] - - - - Any number of persons, not less than nine, may form a corporation to make contracts and issue policies and certificates insuring and protecting persons against loss of life or personal injury resulting from accident.[5] - - - - Any number of persons, not less than twenty-five, residing in any county in this State, who collectively shall own property of not less than $50,000 in value, which they desire to have insured, may form an incorporated company for the purpose of mutual insurance against loss or damage by fire or lightning.[6] - - - - Any number of persons, not less than twenty-five, residing in any congressional or political township, or in one or more adjoining congressional or political townships in this State, not exceeding six in number, who collectively shall own property of not less than $50,000 in value, which they desire to have insured, may form an incorporated company for the purpose of mutual insurance against loss or damage by fire or lightning.[7] - - - - Corporations may be organized to furnish life indemnity or pecuniary benefit to the widows or representatives of members, or accident or permanent disability indemnity to members, and where the funds for the payment of such benefits, shall be secured, in whole or in part, by assessment upon the surviving members.[8] - - - - Any number of persons, not less than nine,

[1] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3696.

[2] Code of Ala. 1886, vol 1, p. 373, § 1531.

[3] 1 Ill. Annot. Stat. [Starr & Curtis] 1886, p. 1310.

[4] Laws of Ill. 1889, p. 191.

[5] Laws of Ill. 1889, p. 169.

[6] 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 1335.

[7] 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 1338.

[8] 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 1348.

may be incorporated as a live stock insurance company.[1] - - - - Mutual fire insurance companies may be incorporated.[2] - - - - Any number of persons, not less than five nor more than thirteen, may organize a corporation to transact the business of life insurance on the assessment plan.[3] - - - - Mutual insurance companies may be organized for the insurance of the lives or health of persons, or against accident to persons.[4] - - - - Any number of persons, not less than ten, may form an incorporated company, for the purpose of mutual insurance of the property of its members against loss by fire or damage by lightning.[5] - - - - Any number of persons, not less than thirteen in number, may form an incorporated company for either of the following purposes, to wit: To make marine insurance, to make fire insurance, or to make insurance on the health or lives of individuals.[6] - - - - Any number of persons, not less than twenty, may form a corporation for mutual insurance against loss or damage, by having had stolen any horse or horses, cattle or sheep, or any loss or expense incurred in recovering such animals as may have been stolen, or in the apprehension of the thief or thieves.[7] - - - - Any number of persons, not less than thirteen, may form a company to make insurance upon the lives of individuals, and every insurance appertaining thereto or connected therewith, on the mutual or stock plan, and grant, purchase or dispose of annuities.[8] - - - - Any number of persons may adopt and sign articles of incorporation for the purpose of transacting insurance business.[9]

§ **164. Lawful Purposes.** —Two or more persons, associating themselves for the carrying on of any industrial business, or for any lawful enterprise, if not otherwise provided by law, may form themselves into a private corporation.[10] - - - - Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.[11] - - - - Any three or more persons, citizens of the United States, who shall desire to associate themselves for

[1] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3708.

[2] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3745.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3762*a*.

[4] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3763.

[5] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3774.

[6] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1627.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2070.

[8] 1 Rev. Stat. Ohio [Giauque], 1890, § 3587.

[9] 2 Sayles Tex. Civil Stat. 1888, p. 29, § 2910.

[10] 1 Code Ala. 1886, p. 404, § 1659.

[11] 2 Deering's Annot. Code & Stat. of Cal. 65, § 286.

any lawful purpose (other than pecuniary profit) may be incorporated.[1] - - - - Corporations may be formed to carry on any lawful business.[2] - - - - Societies, corporations and associations (not for pecuniary profit) may be formed as hereinafter provided.[3] - - - - "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for dealing in real estate, or carrying on professional business; and if the organization is for profit, it must have a capital stock."[4]

§ **165. Lodges: Fraternities: Societies.** — Any persons, congregation, society, church, or any lodge of Freemasons or Odd-Fellows (whether chapter, encampment or subordinate) and any temple or division of the Sons or Daughters of Temperance, and any other voluntary association for religious, educational, scientific or benevolent purposes, may be incorporated.[5] - - - - Whenever ten or more persons desire to form a society for the social and literary advancement of its members, they may become incorporated.[6]

§ **166. Masonic Buildings.** — Whenever three or more persons may desire to form a company to build and maintain buildings, to be used or occupied, in whole or in part, for Masonic meetings or purposes, or in any way for the use, accommodation, or convenience of Masonic bodies or lodges, they may be incorporated.[7]

§ **167. Mining: Manufacturing, etc.** — Two or more persons may form a corporation for mining, quarrying, or manufacturing.[8]

§ **168. Navigation.** — Any two or more persons may be incorporated to operate a line of steamships or other water-craft navigating the sea to and from the port of Mobile to any other port of the United States or of any foreign country.[9] - - - - Any seven or more persons may form a company to build for their own use, equip, furnish, fit, purchase, charter, navigate and own vessels, to be propelled by steam or other expansive fluid, to be used in all lawful commerce and

1 Gen. Stat. Colo. 1883, p. 215, § 367.

2 Gen. Stat. Colo. 1883, p. 180, § 238.

3 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 620.

4 1 Rev. Stat. Ohio [Giauque], 1890, § 3235.

5 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3816.

6 1 Code Ala. 1886, p. 412, § 1702.

7 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3838.

8 Code of Ala. 1886, vol. 1, p. 380, § 1557.

9 1 Code Ala. 1886, p. 402, § 1655.

navigation upon the ocean, seas, sounds and rivers, and for the transportation of passengers, freight and mails.[1] - - - - Any five or more persons may incorporate a company to navigate the lakes and rivers by steam, sail or other boats, ships or vessels.[2] - - - - Any seven or more persons may form a company to navigate the waters of Lake George by steamboats.[3] - - - - Any number of persons may form themselves into a corporation for the purpose of establishing, maintaining and operating steam-packet companies for the transportation of freights and passengers on the navigable streams of the State of Indiana, the rivers bordering thereon, and other navigable waters.[4]

§ **169. Patrons of Husbandry.**— Associations of the order of the Patrons of Husbandry, organized in accordance with the rules and regulations of said order, may become incorporated.[5]

§ **170. Pipe Lines.** — Any number of persons, not less than twelve, may incorporate a company to construct and operate, for the public use, lines of pipe for conveying or transporting therein petroleum, gas, liquids, or any products or property, or to operate for the like public use any line of pipe already constructed.[6]

§ **171. Police Relief.** — Any police force existing by authority of law in any city having over one hundred thousand inhabitants may incorporate a relief association and create a fund to afford relief to members, who become sick or disabled in the discharge of their duties, or become incapacitated, or to aid the families of those who die in the service, and for other similar purposes.[7] - - - - Any police force organized and existing by authority of the laws of this State in any city having a population of over one hundred thousand inhabitants can form a relief association under the general incorporation laws of this State, and create a fund to relieve members, who have become sick or disabled or incapacitated, and to aid the families of those who die in the service, and for such other similar purposes as may be set forth in their articles of incorporation.[8]

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1850.

[2] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1854.

[3] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1853.

[4] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4130.

[5] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3880.

[6] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1862.

[7] 1 Rev. Stat. Mo. 1889, p. 738, § 2885.

[8] 1 Rev. Stat. Mo. 1889, p. 738, § 2885.

§ **172. Political Clubs.** — Any five or more persons of full age, citizens of the United States, a majority of whom are also citizens of this State, who desire to form themselves into a political club, may be incorporated.[1]

§ **173. Public Libraries.** — The inhabitants of any city, town, village or neighborhood may subscribe to a public library and form a corporation therefor.[2] - - - - Any number of persons, not less than seven, may be incorporated for the purpose of establishing and maintaining a public library in any city or county in this State for the general benefit and advantage of all the inhabitants of such city or county.[3] - - - - Twenty persons or more in any county, town, village or neighborhood, may incorporate themselves for the purpose of procuring and erecting a public library.[4]

§ **174. Railroads.** — Any number of persons, not less than seven, desiring to form a corporation to construct a railroad, may file with the Secretary of State a written declaration signed by themselves, setting forth, etc., etc.[5] - - - - Purchasers of a railroad, by judicial sale or otherwise, foreclosing a mortgage, may constitute themselves into a body politic with all the powers and franchises of the corporation originally owning the railroad, if such mortgage embraced the franchises thereof.[6] - - - - Any number of persons, not less than five, may be incorporated to construct and operate a railroad.[7] - - - - Any number of persons, not less than five, may become an incorporated company for the purpose of constructing and operating any railroad in this State.[8] - - - - Corporations may be incorporated under the laws of this State to construct, maintain and operate any elevated way or conveyor.[9] - - - - Any number of persons, not less than fifteen, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning and maintaining such railroad.[10] - - - - It shall be lawful for two or more railroad companies, running railroads to the same town or city, to locate, construct, keep up, repair and use a common or union railroad

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2027.

[2] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3791.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3806.

[4] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2033.

[5] 1 Ala. Code of 1886, p. 384, § 1573.

[6] 1 Ala. Code of 1886, p. 392, § 1598.

[7] Gen. Stat. Colo. 1883, p. 205, § 333.

[8] 2 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 1907.

[9] 2 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 1977.

[10] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3885.

of one or more tracks, connecting the railroads of such companies, for business purposes, and to incorporate the same.[1] - - - - Any owner or owners, or their lessees, of lands, mills, blast furnaces, quarries, iron ore, coal mines or other minerals, or other real estate, or for any company of persons, who shall desire to construct a *lateral* railroad, not exceeding ten miles in length, to locate and construct the same to any other railroad, canal or slack-water navigation, on, over, through or under any intervening lands, and such persons may be incorporated.[2] - - - - Any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property.[3] - - - - Any number of persons, not less than twenty-five, may form a company to construct, maintain and operate a railroad for public use, or to maintain and operate any incorporated railroad already constructed for the like public use.[4] - - - - Any individual, joint-stock association or corporation, engaged in the manufacture of railroad cars, may lay down and maintain such railroad tracks, not exceeding one mile in length, as may be necessary to connect such establishment with the tracks of any railroad, provided they have the consent of the local authorities controlling the street or highway proposed to be occupied and the consent of the owners of one-half in value of the property bounded on such street; or if the consent of the latter cannot be obtained the court may appoint commissioners to determine whether such railroad ought to be constructed.[5] - - - - Any number of persons, not less than ten, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning, maintaining and operating such railroad.[6] - - - - Any number of persons, not less than ten, a majority of whom shall be inhabitants of this State, may form a company to construct, maintain and operate in any foreign country a railroad or railroads for public use in the conveyance of persons and property, or a railroad or railroads already constructed in whole or in part for the like public use, with power to construct, maintain, and operate telegraph lines and lines of steamboats or sailing vessels, as may be proper or convenient for use in connection therewith.[7] - - - - Any number of persons, not less than ten, may form themselves into a company to

[1] 2 Rev. Stat. Ind. 1888 [Myers & Co.], §§ 3954, 3964*a*.

[2] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3987.

[3] 1 Rev. Stat. Mo. 1889, § 2542.

[4] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1738.

[5] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], pp. 1839, 1840.

[6] 2 Sayles' Tex. Civ. Stat., p. 410, § 4099.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1767.

construct, maintain and operate a railway for public use, in the conveyance of persons and property, by means of a propelling rope or cable attached to stationary power.[1]

§ 175 **Rafting: Booming Logs.**— Any five or more persons may be incorporated, under any name or title designating such business, to carry on the business of running, driving, booming and rafting logs, timber, lumber or other floatables on any of the streams or waters in this State, or for the construction of booms across or in any such waters or streams.[2]

§ **176. Religion: Education: Benevolence.** — The members of any church or religious society, of an educational society, benevolent society, or the owners of a graveyard, may be incorporated.[3] - - - - Whenever the regulations, rules or discipline of any church or religious society require for the administration of the temporalities thereof, or for the management of the property or estate thereof, any diocese, synod or district organization of such church or religious society may elect directors and become incorporated.[4] - - - - Any church, congregation or society formed for religious worship, educational or benevolent purposes, may be incorporated.[5] - - - - Any joint stock company or organization, which may have been heretofore organized in this State for religious, educational or benevolent purposes, may be incorporated.[6] - - - - Any church, congregation, or society formed for the purpose of religious worship, may become incorporated in the manner following.[7] - - - - Any number of persons may incorporate themselves to establish a high school, academy, college, university, theological institute, or missionary board.[8] - - - - When the members of two or more churches desire to form a union and assume a new name, they are authorized to do so and may be incorporated.[9] - - - - The wardens and vestrymen of any parish or congregation of any church in this State, duly chosen in accordance with the usages of said church, after a record of such election shall have been made as herein provided, shall be deemed a body corporate.[10] - - - - Any church or religious society, after ten

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1763.

[2] 1 Rev. Stat. Mo. 1889, p. 741, § 2892.

[3] 1 Code Ala. 1886, p. 411, § 1694.

[4] 2 Deering's Annot. Code & Stat. of Cal. 153, § 603.

[5] Gen. Stat. Colo. 1883, p. 216, § 372.

[6] Gen. Stat. Colo. 1883, p. 219, § 384.

[7] 1 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 621.

[8] 2 Rev. Stat. Ind. 1888 [Meyers & Co.], § 3433.

[9] 2 Rev. Stat. Ind. 1888 [Meyers & Co.], § 3597.

[10] 2 Rev. Stat. Ind. 1888 [Meyers & Co.], § 3604.

days' public notice, may at any regular or special meeting elect or appoint, according to the usages of such society, not less than three nor more than nine trustees, who shall be a body corporate, by such name as the society may designate, for any educational, benevolent or charitable purpose.[1] - - - - Any number of persons, not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization, formed for benevolent, religious, scientific, fraternal, beneficial, or educational purposes, may be consolidated and united into a corporation.[2] - - - - Six male persons or more, belonging to any congregation in communion with the Protestant Episcopal church, may incorporate such congregation. This act also applies to citizens of this State, belonging to any congregation in communion with the Protestant Episcopal church in this State, whose place of worship is situated outside of this State and in a country, whose laws do not in terms provide for the incorporation of such congregation.[3] - - - - The persons of full age, belonging to any church, congregation or religious society, may incorporate the same.[4] - - - - Where one priest, clergyman or minister serves two or more incorporated religious societies, a corporation may be formed to take and hold title to ground purchased for parsonage purposes for such societies.[5] - - - - A corporation may be formed to hold property given, devised or purchased by any diocesan convention, presbytery, classis, synod, annual conference, or other religious body having jurisdiction over a number of churches, congregations or religious societies.[6] - - - - An act created a corporation to hold the title to real estate owned in foreign lands by parishes organized there, and in communion with the Protestant Episcopal church of the United States.[7] - - - - Any five or more persons of full age, a majority of whom shall be citizens of this State, may organize themselves into a corporation for benevolent, charitable, literary, historical, scientific, missionary or mission or Sunday-school purposes.[8] - - - - Any twenty or more persons, being citizens of this State, may form themselves into a Young Men's Christian Association corporation.[9]

[1] 2 Rev. Stat. Ind. 1888 [Meyers & Co.], § 3614.

[2] 1 Rev. Stat. Mo. 1889, p. 719, § 2821.

[3] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], pp. 1881, 1883.

3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1884.

[5] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1906.

[6] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1908.

[7] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1913.

[8] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1922.

[9] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p 1933.

§ 177. **Savings Banks.**— Any number of persons, not less than three, may be incorporated as a savings bank.[1] - - - - Any number of persons, being voters of this State, not less than seven nor more than twenty-one, who shall have been citizens of the county where they then reside for at least five years then next preceding, and who shall severally own unincumbered real estate therein worth at least five thousand dollars, exclusive of perishable improvements, may associate themselves together for the purpose of organizing and managing a savings bank in such a county as a body politic and corporate.[2] - - - - Any thirteen or more citizens of the State, two-thirds of whom shall reside in the county where the proposed society shall be located, may associate themselves together and incorporate a savings society or institution for savings.[3] - - - - Any five or more persons in any county of this State may be incorporated for the purpose of establishing a bank of deposit or discount, or of both deposit and discount.[4] - - - - Any ten or more persons may be incorporated as a mutual saving fund, loan or building association, under any name or title designating such business.[5] - - - - Any number of persons, not less than nine, may associate themselves together for the purpose of organizing a savings society or institution for savings.[6] - - - - Any number of persons, not less than nine, may be incorporated as a savings society or institution for savings.[7] - - - - Any number of persons, not less than thirteen, may associate themselves together for the purpose of organizing a savings bank.[8] - - - - Any fifteen or more persons, being of full age, may form a co-operative saving and loan association.[9]

§ 178. **Slack-water Navigation.**— Any number of persons, not less than ten, may form themselves into a corporation for the purpose of building dams across any stream, so as to afford slack-water navigation.[10] - - - - For the improvement of the navigation of any navigable river within the jurisdiction of this State, and for the creation of hydraulic power thereon not impeding the navigation of the same, any number of persons, not less than thirteen, may form themselves into a corporation.[11]

[1] Gen. Stat. Colo. 1883, p. 192, § 281.

[2] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 2703.

[3] Laws of Ill. 1887, p. 77.

[4] 1 Rev. Stat. of Mo. 1889, p. 699, § 2743.

[5] 1 Rev. Stat. Mo. 1889, p. 715, § 2808.

[6] 1 Rev. Stat. Mo. 1889, p.728, § 2849.

[7] 1 Rev. Stat. Mo. 1889, p. 728, § 2849.

[8] 2 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1563, § 236.

[9] 2 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1592.

[10] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4118.

[11] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4099.

§ 179. Soldiers' Monuments.— Any number of persons, not less than three, may form a corporation for the purpose of erecting a monument or monuments to perpetuate the memory of the soldiers and sailors who served in the late war.[1]

§ 180. Sporting. — Any five or more persons of full age, a majority of whom shall be citizens of this State, who shall desire to associate themselves for social, temperance, benefit, gymnastic, athletic, military drill, musical, yachting, hunting, fishing, bathing or lawful sporting purposes, may incorporate themselves therefor.[2]

§ 181. Stage Coaches. — Any number of persons, not less than five, may incorporate a company to maintain and operate any stage or omnibus route or routes for pubiic use in the conveyance of persons and property elsewhere than in the city of New York.[3]

§ 182. Street Railroads. — Any number of persons, not less than five, may become a corporation to construct and use a street railroad in any of the cities or towns of this State.[4] - - - - Any number of persons, not less than five, being subscribers to the stock of any contemplated street or horse railroad company may be formed into a corporation for the purpose of constructing, owning and maintaining street or horse railroads, switches or side tracks upon and through the streets of the cities or towns within this State.[5] - - - - Any number of persons, not less than thirteen, may form a company to construct, maintain and operate a street surface railroad for public use in the conveyance of persons and property in cars for compensation in any of the cities, towns or villages of this State.[6]

§ 183. Telegraphs: Telephones. — Any number of persons may form themselves into a corporation for the purpose of establishing, maintaining and operating lines of electric telegraph within this State.[7] - - - - Any number of persons, not less than five, may from a corporation to construct, own operate and maintain lines of telephone or magnetic telegraph.[8] - - - - Any number of persons

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2058.

[2] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1953.

[3] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1876.

[4] 1 Code of Ala. 1886, p. 393, §§ 1603, 1604.

[5] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4143.

[6] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1810.

[7] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4162.

[8] 1 Rev. Stat. Mo. 1889, § 2716.

may incorporate themselves for the purpose of constructing a line of wires of telegraph through this State.[1] - - - - Telegraph companies, incorporated by this or any other State, shall have the right to construct and operate lines of telegraph along any of the railroads or other public highways in the State, and over the lands of other persons and corporations upon making just compensations as now provided by law.[2] - - - - Any number of persons may form themselves into a corporation for the purpose of establishing, maintaining and operating telephones, telephone lines, and telephone exchanges within this State.[3]

§ **184. Tobacco Warehouses.** — Any number of persons may form themselves into a corporation for the purpose of constructing warehouses in which to inspect, store and sell tobacco.[4]

§ **185. Toll Roads: Plank, Gravel, Macadamized, Turnpike Roads, etc.** — Any number of persons, not less than seven, can be incorporated for the purpose of constructing and operating a macadamized, turnpike, plank, wooden, shelled, graded, or other improved toll-road.[5] - - - - Any number of persons may form themselves into a corporation to construct or own plank, macadamized, gravel, clay and dirt roads.[6] - - - - Any number of persons not less than five may be incorporated to construct and own a plank-road or a turnpike road by complying with the following requirements.[7] - - - - Any five or more persons may form themselves into a corporation to construct and own a graded or gravel road, or plank or macadamized road, or a road composed partly of plank, macadam or gravel for a covering, so as to form a hard and smooth surface.[8]

§ **186. Training Nurses.** — Any five or more persons may form a corporation to educate, train and provide skilled nurses for the sick, and to do such other practical or charitable work in hospital and elsewhere, as may be consistent therewith.[9]

§ **187. Tramways, Elevated.** — Any member or persons, not less than thirteen, may incorporate a company to construct, maintain and

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2060.

[2] 1 Code of Ala. 1886, pp. 401, 402, §§ 1652–1654.

[3] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4181.

[4] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4193.

[5] 1 Code Ala. 1886, p. 396, § 1613.

[6] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3624.

[7] 2 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1477.

[8] 1 Rev. Stat. Mo. 1889, § 2690.

[9] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2087.

operate an elevated tramway for the transportation of freight in suspended buckets, cars or other receptacles, for hire.[1]

§ 188. Trust Companies. — Any number of person, not less than three, may be incorporated to carry on a trust, deposit and security business.[2] - - - - Any three or more persons may be incorporated, under any name or title designating such business, as trust companies, to receive moneys in trust, and to execute any trusts confided to them, and to guarantee the fidelity of any persons holding places of public or private trust, and to act as guardian or curator of any infant or insane person, and to hold any real or personal estate in trust.[3] - - - - Any number of natural persons, not less than thirteen, may organize a trust company, but three-fourths of such persons shall reside in this State.[4]

§ 189. Union Depots. — Any number of persons, not less than five, may form, or any two or more railroad companies may form, or join others in forming, a corporation to construct, establish and maintain a union station for passenger or freight depots, or for both, in any city, town, or place in this State.[5] - - - - The presidents of two or more railroad companies running railroads to the same city, town or village may by consent and under the direction of their respective boards of directors, file articles of incorporation, for the purpose of purchasing depot grounds, and locating, constructing and maintaining a common or union station-house and passenger depot, and a union railroad by two or more tracks connecting the railroads of such companies for business purposes.[6]

§ 190. Water Works. — In case of the sale of any water-works property within the State, by the judgment and decree of any court of competent jurisdiction within this State, the purchaser or purchasers thereof may form a corporation.[7] - - - Any number of persons, not less than seven, may hereafter organize in any town or village of this State a water-works company under the provisions of this act.[8]

§ 191. Indiana: Enumeration of Purposes for which Corporations may be Formed. — Any number of persons may associate

[1] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1879.

[2] Gen. Stat. Colo. 1883, p. 195, § 294.

[3] 1 Rev. Stat. Mo. 1889, pp. 724, 725, §§ 2836, 2839.

[4] 2 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 1596.

[5] 2 Ill. Annot. Stat. [Starr & Curtis] 1885, p. 1925.

[6] 1 Rev. Stat. Ohio [Giauque], 1890, § 3446.

[7] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 4200.

[8] 3 Rev. Stat. of New York [Banks & Bros. 8th ed.], p. 2047.

themselves together and be incorporated: First. To establish associations for horticultural or agricultural purposes, or to promote and encourage the mechanical arts, or for literary or scientific purposes, or for dredging or deepening the channels of rivers and creeks, or for the improvement of harbors. Second. To establish and maintain schools or institutions for the education of males or females. Third. To establish and maintain asylums for the care, support, discipline and education of orphan children; or to establish and maintain homes for the care and support of aged females, who cannot support themselves, or for the care and support of crippled persons. Fourth. To purchase and hold suitable grounds for the burial of the dead. Fifth. To organize lodges or other bodies of Masons or Odd-Fellows, Knights of Honor and Knights and Ladies of Honor: also divisions or associations of temperance or other charitable associations or orders; to organize churches, conferences, and religious societies; to organize societies for the prevention of cruelty to either animals or children; and to organize a State Grange of Patrons of husbandry and subordinate Granges. Sixth. To organize military or fire companies, companies to erect buildings suitable for public meetings, and companies to plant shade trees. Seventh. To organize safe deposit and loan companies. Eighth. To organize associations to build, own and operate hotels. Ninth. To organize associations to buy, hold and sell real estate. Tenth. To organize associations to buy, lease and hold mineral springs and to build and carry on hotels, cottages and bath-houses there. Eleventh. To organize companies to sink and operate oil and gas wells. Twelfth. To establish companies to import live stock into the United States and to keep registers of all imported live stock.[1]

§ 192. **Texas: Enumeration of Purposes for which Corporations may be Formed.** — Private corporations may be formed by the voluntary association of three or more persons, for the following purposes, viz.: 1. The support of public worship. 2. The support of any benevolent, charitable, educational or missionary undertaking. 3. The support of any literary undertaking, the maintenance of a library, or the promotion of painting, music or other fine arts. 4. The encouragement of agriculture and horticulture by associations for the maintenance of public fairs and exhibitions of stock and farm products. 5. The maintenance of a public or private cemetery. 6. The construction and maintenance of any species of road except a railroad and a bridge in connection therewith. 7. The construction and maintenance of a bridge. 8. The construction and maintenance of a telegraph or telephone line. 9. The establishment and maintenance of a ferry. 10. The establishment and maintenance of a line of stages. 11. The

[1] 2 Rev. Stat. Ind. 1888 [Myers & Co.], § 3502.

building and navigation of steamboats, and the carriage of persons and property thereon. 12. The supply of water to the public. 13. The manufacture and supply of gas, or of the supply of light or heat to the public by any means. 14. The transaction of any manufacturing or mining business. 15. The transaction of a printing or publishing business, and in connection therewith the sale of goods, wares and merchandise of a stationery and blank book manufacturing business. 16. The establishment and maintenance of a hotel. 17. The erection of buildings and the accumulation and loan of funds for the purchase of real property in cities, towns and villages. 18. The transportation of goods, wares and merchandise or any valuable thing. 19. The promotion of immigration. 20. The construction and maintenance of sewers. 21. The construction and maintenance of a street railway. 22. The erection and maintenance of market houses and market places. 23. The construction and maintenance of canals for the purposes of irrigation, navigation and manufacturing. 24. The purchase and sale of agricultural and farm products, goods, wares and merchandise, provided that the capital stock of such corporations shall not exceed twenty thousand dollars. 25. The construction of harbors and canals on the coast of the Gulf of Mexico. 26. The growing, purchasing and selling seeds, plants, trees, etc., for agricultural, horticultural and ornamental purposes. 27. The construction and maintenance of mills and gins. 28. The accumulation and loan of money; but this subdivision shall not permit incorporation with banking or discounting privileges. 29. The construction and maintenance of stock yards and pens. 30. The construction and maintenance of establishments for slaughtering, refrigerating, canning, curing and packing meat. 31. The construction and maintenance of establishments for the preserving and canning of fruits, vegetables and fish.[1]

SUBDIVISION II. Decisions Construing Particular Statutes.

§ **200. Corporation for Internal Improvements.** — The constitution of West Virginia of 1861–3 contains this prohibition: "No

[1] 1 Sayles' Texas Civil Stat. 1888, pp. 212, 213, §§ 565, 566.

special act incorporating or granting peculiar privileges to any joint-stock company or association not having in view the issuing of bills to circulate as money or the construction of some work of internal improvement shall be passed." It has been held in that State that a corporation created by a special act of the legislature for the purpose of constructing and maintaining a *pipe line* for the conveyance of petroleum was valid, the purpose of the corporation being an internal improvement within the meaning of the above prohibition.[1] It was further held that the legislature might confer upon such a company the power of appropriating lands necessary for its pipe line in virtue of the right of eminent domain.[2]

§ 201. "Lawful Sporting Purposes" — Actions for Violation of Game Laws.— A statute[3] which authorizes incorporations for "social, gymnastic, esthetic, musical, yachting, hunting, fishing, boating or lawful sporting purposes," does not allow incorporations for the purpose of instituting actions to recover penalties for violations of the game laws. The authority given to the corporation by the act, to sue and be sued, is subject to the qualification that it is in relation to some matter within the scope of the statute and the legitimate purpose of the organization.[4]

§ 202. Erection of Buildings. — A general statute authorizing the formation of corporations "for the erection of buildings" is understood to authorize the formation of corporations engaged or to be engaged in the *business* of erecting buildings, — in other words, in the formation of building companies or associations. It may be that such a company may erect buildings on its own property, but it is reasoned that the leading object of such an association must be, not the mere purchase and improvement of real estate, and a subordinate and incidental object the erection of buildings thereon, as one of the modes of such improvement; but that the leading object of the associates must be to carry on the business of erecting buildings for themselves or others, and not to confine themselves, as the primary and sole object of their organization, to the erection or improvement of a single building upon a single property of their own, for its more convenient and lucrative development and use.[5]

[1] West Virginia Transportation Co. *v.* Volcanic Oil and Coal Co., 5 West Va. 382.

[2] *Ibid.*

[3] New York Act of 1865, chap. 368.

[4] Ancient City Sportsman's Club *v.* Miller, 7 Lans. (N. Y.) 412.

[5] People *v.* Troy House Co., 44 Barb. (N. Y.) 625. In this case the corporation was ousted of its franchises.

§ **203. "Industrial Pursuits."** — A corporation organized to carry on the business usually performed by an *express company*, is a corporation organized for the prosecution of an industrial pursuit, within the meaning of section 1889 of the Revised Statutes of the United States.[1]

§ **204. "For any other Purpose intended for Mutual Profit," etc.**— A statute of Texas, after enumerating twenty-six special purposes for which corporations could be chartered, contained a twenty-seventh subdivision reading as follows: "For any other purpose intended for mutual profit or benefit, not otherwise specially provided for, and not inconsistent with the constitution and laws of this State."[2] Construing this statute, it has been held that a corporation which, according to a recital in its articles of association (called its charter) was formed "for the purpose of buying, selling, and dealing in real estate, live stock, bonds, securities, and other properties of all kinds, on its own account and for commission, in the United States and elsewhere," — was legally incorporated, there being recited in the constitution and laws of the State no express or implied prohibition of the business.[3]

§ **205. For "Other Lawful Business."**— The question recently arose under the Minnesota statute enabling corporations to be formed for the carrying on of certain enumerated kinds of business and also for "other lawful business,"[4] whether a corporation whose purpose, as stated in its articles of association, was "the purchasing and holding of *real estate*, subdividing the same into town or village lots and town sites, and selling and disposing of the same," was a lawful corporation. The Supreme Court of Minnesota held that the statute covered a business of this kind. The court regarded the point as turning entirely on the words of this statute, "or other lawful business."[5] - - - - A corporation formed to carry on a manufacturing or mechanical business and to purchase the stock of an insolvent corporation, may stand under such a statute, although its organization purports to be under another.[6] - - - - In Pennsylvania, an application under a statute for a charter for the maintenance of a *private park* on a lake is for a lawful purpose, it not appearing that the object is to reduce a public

[1] Wells *v.* Northern Pacific R. Co., 23 Fed. Rep. 469.

[2] Rev. Stat. Tex. art. 566, subdiv. 27.

[3] National Bank *v.* Texas Investment Co., 74 Tex. 421; *s. c.* 12 S. W. Rep. 101; criticising Navigation Co. *v.* Galveston Co., 45 Tex. 272.

[4] Minn. Stat. 1866, chap. 34, § 45, as amended by Minn. Laws 1873, chap. 13.

[5] Brown *v.* Corbin (Minn.), 42 N. W. Rep. 481; *s. c.* 40 Minn. 508.

[6] State *v.* Minnesota Thresher Manuf'g Co., 40 Minn. 213; 41 N. W. 1020.

lake to private dominion.[1] - - - - Where, as in Indiana, the law permits the *consolidation* of corporations, it is not against public policy for a corporation to be organized with the ulterior purpose of consolidation with another.[2] - - - - Corporations to protect the personal property of the members against theft; to confer with the State authorities, therefor; to employ counsel to assist in prosecuting persons charged with crime; to employ detectives to co-operate with the authorities; and to raise means by uniform assessments on the personal property of the members, are within the purview of that subdivision of the Texas statute[3] prescribing the purposes for which corporations may be formed which includes "any other purpose intended for mutual profit or benefit . . . not inconsistent with the constitution and laws of this State."[4] - - - - A corporation for "buying, selling, and dealing in real estate, live-stock, bonds, securities, and other properties of all kinds, on its own account and for commission," — is authorized by the same statute.[5]

§ **206. "Beneficial or Protective Purposes."** — An incorporation for the purpose of recovering stolen property, and, in case of failure to recover it, to pay a part of its value to the loser, has been held not to be an incorporation "for the maintenance of a society for beneficial or protective purposes" under section 2 of the Pennsylvania Act of April 29, 1874, and a charter for such a purpose should be refused.[6]

§ **207. "Manufacturing Purposes."** — The *business* of preparing *ice* in its natural condition for use as an article of consumption is within a statute authorizing the formation of corporations for *manufacturing* purposes.[7] The manufacture of *lumber*, *flour* and *meal* is within the meaning of the Illinois act of 1849 authorizing "the formation of corporations for manufacturing, agricultural, mining and mechanical purposes."[8]

§ **208. "Works of Public Utility."** — The establishment and maintenance of a wharf-boat and steam elevator at Monroe, for a general storage and forwarding business, is a "work of public utility," within La. Rev. St., sec. 683, for which a corporation may be authorized.[9]

[1] Lake Wynola Assoc., 3 Pa. County Ct. 626.

[2] Hill *v.* Nisbet, 100 Ind. 341.

[3] Rev. Stat. art 566, subd. 27.

[4] Guadalupe &c. Stock Asso. *v.* West, 70 Tex. 391.

[5] National Bank *v.* Texas Investment Co., 74 Tex. 421; *s. c.* 12 S. W. 101.

[6] Solebury Mut. Protection Asso., 3 Pa. County Ct. 637.

[7] Attorney-General *v.* Lorman, 59 Mich. 157.

[8] Cross *v.* Pinckneyville Mill Co., 17 Ill. 54.

[9] Glen *v.* Breard, 35 La. An. 875.

§ 209. "Pecuniary Profit." — A corporation organized entirely for educational purposes is not "a corporation for pecuniary profit," by reason of the fact that fees are charged for tuition.[1]

§ 210. "Loan, Mortgage, Security, Guaranty, Indemnity Company." — A corporation authorized to establish a public exchange for receiving deposits of and transferring earnest moneys, stocks, bonds, and other securities, procuring and making loans thereon, and guaranteeing the payment of bonds and other obligations, is a "loan, mortgage, security, guaranty, and indemnity company," and a corporation "having the power of receiving money on deposit," within N. Y. Acts 1874, ch. 324, requiring reports from such corporations to the superintendent of the banking department.[2]

Article II. Steps Necessary to Perfect Organization.

[1] St. Clara Female Academy *v.* Sullivan, 116 Ill. 375; s. c. 56 Am. Rep. 776.

[2] People *v.* Mutual Trust Co., 96 N. Y. 10.

§ 215. Corporations may be Organized under General Laws. — As already seen, a corporation can only be created by or under authority of the sovereign power, which power is in this country expressed in acts of the legislature.[1] It has already been observed that it is a principle of American constitutional law that legislative power cannot be delegated; that, where certain power is vested in the general assembly of the State by the constitution, it is not competent for that body to cast it off on some other body or agency.[2] A limitation of this rule is that it is competent for the legislature to provide for the organization of corporations through the action of judicial or ministerial officers under general laws;[3] and, as hereafter seen, constitutional provisions exist in many of the States forbidding their creation by special laws.[4]

§ 216. Theory of the Nature of a Charter where the Incorporation is under a General Law. — Where a corporation is organized under a general law, it may frequently become a question what provisions of its articles of association are to be deemed to have the force and effect of a *charter* granted by the legislature, and what are to be deemed to have the force and effect of *by-laws* with which the public, in the absence of notice of their terms, have no concern. This question was considered in a case where it became material to inquire whether a provision in the

[1] *Ante*, § 35.

[2] *Ante*, § 36.

[3] *Ante*, § 37. "That corporations may be organized under general laws is no longer a debatable question." Black, J., in Granby Mining &c. Co. *v.* Richards, 95 Mo. 106, 112.

[4] *Post*, § 573, *et seq.*

articles of association of a banking corporation, which limited every stockholder to an ownership of one hundred shares, was to be considered as having the force of a charter requirement, or only that of a corporate by-law. It was said by Lewis, P. J.: "We cannot say that there is no charter in the case. For without a charter in the generic sense there can be no such thing as a corporation. The general statute, when aroused into specific operation by a compliance with its terms on the part of an association of persons and capital, unites itself with the terms and details of such a compliance; the law and the articles of association become, as it were, the compact between the State and the association, and this constitutes a charter of the body politic. Thus, when the law requires that the articles, to be filed with a particular officer, shall set forth the amount of the capital stock, and the capital stock is thus set forth at fifty thousand dollars, these concurrent declarations are the equivalent of a charter provision that the new corporation shall be entitled to hold and operate a capital stock amounting to the sum specified. But no provision in the articles, which is not responsive to some specification in the law, can have any such force or effect. Such a provision, not called for by the law, will be a mere voluntary proposal from the association. It will be lacking in the essential elements of a compact, will derive no operative energy from the statute, and can have no claim to the dignity and effectiveness of a charter regulation."[1] Where, in preparing a certificate of incorporation, the corporators employ only the words used in the statute to describe the general purposes of such incorporation, it will be *presumed* that they intended to create a corporation of the same general nature and with the same general powers granted by the

[1] O'Brien *v.* Cummings, 13 Mo. App. 197. It was accordingly held that, as the provisions of the general law contained no limitation as to the number of shares which any shareholder might own, the provisions of the articles in question were inoperative, in so far as concerned the title of a stranger to the corporation who might become the purchaser of its shares; and that a transfer of shares made in good faith to one who already held one hundred shares was, notwithstanding the prohibition in the articles of association, valid and effectual as between the parties to it; and accordingly that, the corporation becoming insolvent, a subsequent judgment creditor of it could not have an execution against the transferor, by motion under the statute, on the theory that he was still the owner of the shares.

statute, rather than that, by such words, they sought to apply special limitations on the powers of the corporation.[1]

§ 217. **When Life of Corporation Commences.**— "The life of a corporation dates from its *organization*, and not from the time it begins to do business."[2] Where the statute points out the manner in which the corporation shall be organized, and the direction of the statute is followed, this brings the corporation into existence, so that it may enter upon the objects of its creation.[3]

§ 218. **Distinctions between Actions against the Supposed Corporation and Actions against a Supposed Corporator.** — Essential distinctions exist, in respect of the question when a corporation is deemed to be in existence, between cases where the action is against the supposed corporation itself, and cases where the action is against one of the supposed corporators, to charge him personally upon a contract entered into in the name of the supposed corporation. In the former case, the courts generally decline to enter into an inquiry as to the regularity of the organization of the corporation, for public reasons, — that is to say, in view of the public inconvenience of litigating the question of existence of a corporation in a collateral proceeding.

[1] Whetstone *v.* Ottawa University, 13 Kan. 320.

[2] Hanna *v.* International Petroleum Co., 23 Ohio St. 622. But it does not follow that a corporation has no legal existence, from the fact that it commences business in a foreign State, where there is a provision in its charter authorizing it so to do, without having done any business in the State of its creation. *Ibid.*

[3] Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53; People *v.* Bowen, 30 Barb. (N. Y.) 24. Where the persons named in the charter of a railway company met within a few days after the passage of the charter, and, by a resolution, adopted the same, and, on the following day, elected officers, and thereafter authorized the president to survey routes and locate the road, and to make contracts for the right of way and for depot grounds; and books were opened for subscription to the capital stock, and the stock was all taken; and the company obtained permission of the commissioners of highways to locate and operate tracks along and across all roads and highways upon its route, and obtained permission from the City of Chicago to locate and operate a track through a portion of the city and to build a bridge over the Chicago river, which grants were duly accepted; and the capital stock was also increased and the new stock subscribed for, — it was held that the charter was in operation, within the meaning of a clause of the new constitution of Illinois (Ill. Const. of 1870, art. 11, § 2), abrogating corporate charters not in operation. McCartney *v.* Chicago &c. R. Co., 112 Ill. 611.

On the contrary, they hold the corporation, on the one hand, and the party contracting with it, on the other, *estopped* from questioning the validity of its organization.[1] In such a case it has been said: "If the papers filed, by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the State against it, it would for that reason be dissolved, yet, by the acts of *user* under such organization, it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person."[2] But where the action is brought against an alleged corporator, to charge him on a contract made for the pretended corporation, if the corporation does not exist, he will ordinarily be *liable as a partner*, on the theory of a breach of warranty of agency, elsewhere explained;[3] and, in such an action, it will be open to the plaintiff to show that there was no corporation; and the defendant must show a valid corporate organization, in order to escape personal liability.[4]

§ 219. Necessity of Articles or Certificate of Incorporation.— It has already been seen that a number of individuals, by the mere act of uniting and calling themselves a corporation, cannot constitute themselves such, but that a corporation can only be created by the sovereign power.[5] It will hereafter be pointed out that the principle which validates irregularities in the organization of corporations, when their corporate existence is questioned in collateral proceedings, applies only in cases where the corporation *might* have existed. If we attend to these principles, we shall see that a corporation cannot be deemed to exist, even *de facto*, where the adventurers never had any charter at all.[6] It is elsewhere shown[7] that the voluntary act of individuals in

[1] *Post*, § 3683, *et seq.*

[2] Buffalo &c. R. Co. *v.* Cary, 26 N. Y. 77. Substantially the same doctrine is announced in Krutz *v.* Paola Town Co., 20 Kan. 403; Pape *v.* Capitol Bank, 20 Kan. 440. It is recognized in Kaiser *v.* Lawrence Sav. Bank, 56 Iowa, 104, 108, where the distinction stated in the text is taken, and in other cases almost without number.

[3] *Post*, § 2969, *et seq.*

[4] Kaiser *v.* Lawrence Sav. Bank, 56 Iowa, 104. The case of Humphreys *v.* Mooney, 5 Colo. 282, holding that in such an action the plaintiff, by reason of having entered into an express contract with the assumed corporation, is estopped, is denied.

[5] *Ante*, § 35.

[6] *Post*, § 505.

[7] *Ante*, § 216.

compliance with a general law, whereby they sign, acknowledge and file articles of association, makes them a corporation, and that the articles of association, read in connection with the general law, constitute their charter. It must follow, from a consideration of these premises, that where a collection of persons claim to have organized themselves into a corporation under a general law, their claim will not be good, even when questioned collaterally, provided they file *no articles* of association at all; and such is the adjudged law.[1] The rule is the same where the adventurers file articles which are *fatally defective* by reason of not conforming to the essential requirements of the governing statute.[2] On the other hand, the corporation is generally deemed to exist from the time when the certificate of incorporation, articles of association, or other instrument of incorporation prescribed by statute, is executed, acknowledged, and recorded or filed for record, in accordance with the governing statute; and thereafter the lawfulness of the existence of the corporation cannot be denied in any controversy, except in an action by the State to vacate its franchises.[3] Thus, under the statutes of Pennsylvania, where articles of association have been approved by the attorney-general and Supreme Court of the State and duly enrolled, such association becomes a corporation, and such articles cannot be collaterally questioned.[4]

§ 220. Corporate Existence Proved by User under an Instrument of Incorporation. — As more fully explained hereafter,[5] the existence of a corporation is usually proved by showing a valid instrument of incorporation and acts of *user* thereunder. This instrument of incorporation may consist of a special charter, that is, a special act of the legislature incorporating the particular company, or a certificate or articles of

[1] Abbott *v.* Omaha Smelting &c. Co., 4 Neb. 416; Childs *v.* Smith, 55 Barb. (N. Y.) 45, 53.

[2] Fifth Baptist Church *v.* Baltimore &c. R. Co., 4 Mackey (D. C.), 43; New York Cable Co. *v.* Mayor, 104 N. Y. 1; McCallion *v.* Hibernia &c. Co., 70 Cal. 163; *s. c.* 12 Pac. Rep. 114; *post*, § 221.

[3] Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Hunt *v.* Kansas-Missouri Bridge Co., 11 Kan. 412. See Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

[4] Society for Visitation of the Sick *v.* Commonwealth, 52 Pa. St. 125.

[5] *Post*, § 497, and Ch. 184, Art. III.

incorporation, by whatever name designated, executed and filed in some public office, in pursuance of a general law.[1] The usual method of proving the existence of a corporation created by special charter is to prove the act of incorporation (it being a special law, of which the courts do not take judicial notice), and to prove acts of *user* under it.[2] If it is a corporation created by a foreign statute, the statute must be proved *as a fact*, in the mode prescribed by the law of the forum for the proof of foreign laws. If the statute is a special law of a foreign State, the mode of proving it will usually be by an exemplified copy, certified by the Secretary of State, or otherwise authenticated as provided by the act of Congress. If the corporation is organized under a general law of another State of the Union, it will usually be sufficient, under the rules of evidence in most of the States, statutory or resting in adjudged cases, — to prove it by the production of a book of the statutes of such other State, which purports on its face to be published by the authority of such State.[3] If the corporation purports to be organized under a general law of the State of the forum, it will usually be sufficient to prove the charter or the making and filing of the certificate, articles of association, or other instrument of incorporation, required by the statute, and to prove acts of user thereunder.[4] But it is, no

[1] "The proof of the act of incorporation, of the action under it, and of the dealings of the respondent with the petitioner as such corporation, is presumptive evidence that the corporation was legally organized, and is sufficient for the maintenance of a petition in the corporate name." Braintree Water Supply Co. *v.* Braintree, 146 Mass. 482, 488. See also Narragansett Bank *v.* Atlantic Silk Co., 3 Met. (Mass.) 282; Middlesex Husbandmen *v.* Davis, 3 Met. (Mass.) 133; Worcester Medical Institution *v.* Harding, 11 Cush. (Mass.) 285; Appleton Ins. Co. *v.* Jesser, 5 Allen (Mass.), 446; Topping *v.* Bickford, 4 Allen (Mass.), 120; Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385; Wood *v.* Wyley Const. Co., 56 Conn. 87; *s. c.* 13 Atl. Rep. 137; 5 New Eng. Rep. 921.

[2] Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539.

[3] In the absence of a local statute in relation to proving the incorporation of a foreign corporation, the certificate of incorporation, duly acknowledged before a notary public, and authenticated by the certificate of the Secretary of State, and by a certificate of a commissioner of the State of the forum, is a sufficient authentication. Hammer *v.* Garfield Mining Co., 130 U. S. 291; 32 Lawyer's ed. 964; 9 Sup. Ct. Rep. 548.

[4] Bank of Toledo *v.* International Bank, 21 N. Y. 542; Leonardsville Bank *v.* Willard, 25 N. Y. 574. Whenever it is shown that the organization

doubt, competent for the legislature to declare what shall be evidence, *prima facie*, of the formation of a corporation;[1] and many of the statutes provide that a duly certified copy of the articles of association shall be *prima facie* evidence of the incorporation of the company. Of course, the terms of the statute are not uniform. Some of them call for a duly certified copy of the articles, and also of the affidavit required by the governing statute to be annexed thereto. The effect of such a provision is to cast the *burden* upon the party attacking the validity of the corporate organization, to prove the non-performance of any condition precedent prescribed by the governing statute,[2] — as, for instance, the payment into the treasury of the corporation of the percentage of capital stock required by the statute, if such is to be deemed a condition precedent. If the acts and proceedings of a company or association consist only of such acts and proceedings as might be *performed by individuals* without an incorporating act, or corporate grant or franchise, a corporation cannot be inferred from such acts.[3] It has been held that the acts and admissions of a party to a suit, such as that he served as the president of a corporation, or gave a note to it in its corporate name, constitute, as against him,

of a corporation has taken place in the manner directed by its charter, there is a legally constituted company authorized by the charter to proceed to carry out the purposes of its creation. And where a majority of the persons to be affected by the purposes of a corporation are required to assent to its organization, it seems that such consent may be shown by indirect acts of acquiescence, and that it is not necessary that it should appear that a majority of such persons actually voted at an election of directors, or that the directors were elected by a majority of persons actually voting. Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53.

[1] Holmes *v.* Gilliland, 41 Barb. (N. Y.) 569, per Leonard, J.

[2] Eastern Plank Road Co. *v.* Vaughn, 14 N. Y. 546. It was held by Flandrau, J., in an early case in Minnesota, that, under a statute of that State providing that "every written instrument purporting to have been signed or executed by any person, shall be proof that it was signed and executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit" (Comp. Stats. Minn., p. 685, § 80), — the articles of association of an assumed corporation were, of themselves, proof that they were signed or executed, until the persons by whom they purported to be signed and executed denied the signatures of execution under oath. Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 37.

[3] Abbott *v.* Omaha Smelting &c. Co., 4 Neb. 414, 420; citing Greene *v.* Dennis, 6 Conn. 302.

prima facie evidence of *user* of the corporate franchises, under the rule of the preceding section.[1]

§ 221. Defective Certificate not Prima Facie Evidence of Incorporation. — A certificate which fails to comply with the essentials required by the statute will not be effective to bring the corporation into existence, and will not be proof of its corporate existence.[2] Thus, where the governing statute prescribes that the certificate shall be *signed* by the *stockholders*, if it is signed by the *directors* only, it is not sufficient, and the proceedings thereunder, though in good faith, are void; and there is no corporation, and a mortgage given to the assumed corporation by one of its officers to secure a stock subscription, cannot be enforced.[3] So, where the governing statute required that the articles of incorporation should, among other matters, "set forth . . . that a majority of the members of such association . . . voted at such election," etc.,[4] and the articles failed to state this fact, it was held that they were not sufficient to constitute the association a corporation.[5] If, however, the object of the incorporation is expressed in the articles, and is an object contemplated by the governing statute, and the articles are *substantially* in the form prescribed by the statute, and their provisions indicate an intention to form a corporation rather than a voluntary association, — the associates, it has been held, may be deemed a corporation, notwithstanding the fact that the articles do not conform to the statute in some particulars, — *e.g.*, in stating the *residence* of the subscribers, and in referring to the statute.[6]

[1] Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539.

[2] McCallion *v.* Hibernia &c. Society, 70 Cal. 163; *s. c.* 12 Pac. Rep. 114; Fifth Baptist Church *v.* Baltimore &c. R. Co., 4 Mackey (D. C.), 43; People *v.* Selfridge, 52 Cal. 331; Harris *v.* McGregor, 29 Cal. 124.

[3] Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179.

[4] Cal. Civ. Code, § 594.

[5] People *v.* Selfridge, 52 Cal. 331. Under the Revised Statutes of the District of Columbia, § 535, a recorded certificate of incorporation of a religious society is not evidence of a corporate organization, unless it state the *date* of the *election* or appointment of the trustees, the length of time for which the trustees were elected or appointed, and also unless it is verified by an *affidavit* of one of the persons making the certificate. Fifth Baptist Church *v.* Baltimore &c. R. Co., 4 Mackey (D. C.), 43.

[6] Rogers *v.* Danby Universalist

§ 222. Distinction between User under Special Charter and Compliance with Conditions under General Law. — "There is," said Sheldon, J., "a manifest difference where a corporation is created by special charter and there have been acts of *user*, and where individuals seek to form themselves into a corporation under the provisions of a general law. In the latter case, it is only in pursuance of the provisions of the statute for such purpose, that the corporate existence can be acquired. And there would seem to be a distinction between the case where, in a suit between a corporation and a stockholder or other individual, the plea of *nul tiel corporation* is set up to defeat a liability which the one may have contracted with the other, and the case of a suit against individuals who claim exemptions from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case, a stricter measure of compliance with statutory requirements will be required than in the former." [1]

§ 223. Originals Evidence where Statute prescribes Copy.— By a statute of North Carolina when certain things are done and the articles of incorporation prescribed are recorded, "the clerk, under the seal of the Superior Court, shall issue letters, declaring said persons and their successors to be, and henceforth they shall be, a corporation, for the purpose and according to the terms prescribed in said articles," etc.[2] Another section of the same statute provides that "all such letters issued under the authority of this chapter, and copies thereof, certified by the clerk of the Superior Court of the county where the same are recorded, shall, in all cases, be admissible in evidence, and the letters aforesaid shall, in all judicial proceedings, be deemed *prima facie* evidence of the complete organization and incorporation of the company purporting thereby to have been established." [3] It is perceived that this statute makes two things evidence: 1. Copies of the record. 2. The letters of incorporation, which in substance and effect are copies of the recorded articles of incorporation. It has been held that the original record — that is the record book itself, — is evidence, since "the record or entry itself is as certain and effective as a copy of it." [4]

Society, 19 Vt. 187. Where the governing statute of a railroad corporation required that the *directors* should be *named* in the articles of association, it was deemed a sufficient compliance with the requirement that the articles were adopted at the time of electing the directors. The requirement was regarded as directory merely. Eakright *v.* Logansport &c. R. Co., 13 Ind. 404.

[1] Bigelow *v.* Gregory, 73 Ill. 194, 201.

[2] Code of North Car., § 679.

[3] *Ibid.*, § 682.

[4] Carolina Iron Co. *v.* Abernathy, 94 N. C. 545. In an earlier case

§ 224. Literal Compliance with Statute not Necessary: Substantial Compliance Sufficient. — A literal compliance with the recitals prescribed by the statute to be contained in the certificate of incorporation is not necessary. A substantial compliance is sufficient.[1]

§ 225. Substantial Compliance Necessary. — On the other hand, there is much authority for the conclusion that the existence of a corporation, formed under a general statute which requires certain acts to be done before the corporation can be considered *in esse*, or before its transactions can be regarded as valid, — must be proved by showing at least a substantial compliance with the requirements of the statute.[2]

§ 226. Distinction between Conditions Precedent and Conditions Directory. — A distinction exists between precedent or

the court, against the objection that letters of administration should be produced, allowed the minute record of the county court, showing the appointment of the administrator, to be read for the purpose of proving his appointment, qualification, and authority; and this was held proper. Hoskins *v.* Miller, 2 Dev. L. (N. C.) 360. Other cases are to the effect that, while authenticated copies of records are evidence because made so by statute, yet the originals themselves are competent and even better evidence, when pertinent. State *v.* Voight, 90 N. C. 741. The originals are evidence under the principles of the common law. St. Louis Gaslight Co. *v.* St. Louis, 12 Mo. App. 573; *s c.*, aff'd, 86 Mo. 495. See also State *v.* Hunter, 94 N. C. 829.

[1] Ex parte Spring Valley Water Co., 17 Cal. 136; Spring Valley Water Co. *v.* San Francisco, 22 Cal. 440; People *v.* Stockton &c. R. Co., 45 Cal. 306, 313; Thompson *v.* People, 23 Wend. (N. Y.), 537; Hughes *v.* Antietam Man. Co., 34 Md. 316, 324. This rule was enacted in Louisiana by a statute passed as early as 1852: "Nor shall any mere informality in organization have the effect of rendering a charter null, or of exposing a stockholder to any liability beyond the amount of his stock, provided the provisions of this act have been substantially complied with." Louisiana Act of 1852, p. 131, § 8. In Colorado it has been said: "We have no doubt but that in this State a *substantial* compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation; and that a failure to comply therewith, in any material particular, is ground for the impeachment of corporate existence, in an appropriate proceeding prescribed by the proper authority." People *v.* Cheeseman, 7 Colo. 376, 379, opinion by Helm, J.

[2] Mokelumne Hill &c. Co. *v.* Woodbury, 14 Cal. 424; Bigelow *v.* Gregory, 73 Ill. 197; Union Insurance Co. *v.* Cram, 43 N. H. 641; Harris *v.* McGregor, 29 Cal. 124.

necessary conditions named in the statute, and conditions which are merely directory. If the former are not strictly complied with, there is no corporation, and this may be shown in a collateral proceeding.[1] But if the latter are not complied with, the question is merely one between the state and the corporation; it can not be raised in a collateral proceeding. In a case often quoted to this point it was said by the court, speaking through Cope, J: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter."[2]

§ **227. Illustrations.** — A statute of Michigan[3] permits the organization of private corporations for supplying water to cities, towns and villages and the inhabitants thereof, wherever the municipal authority shall resolve that it is expedient to have water-works, but inexpedient for the town to build them. No such corporation can be organized until these conditions have been strictly fulfilled; and the municipality can not waive them. Nor can a subsequent recognition cure the defect.[4] - - - - The following acts, under the terms of various governing statutes, have been held *conditions precedent*, without the doing of which there is no incorporation: — filing articles of incorporation with the county clerk;[5] recording them in the proper county;[6] obtaining the authorization or certificate of the district attorney or

[1] Attorney-General *v.* Hanchett, 42 Mich. 436; Heinig *v.* Adams &c. Manf. Co., 81 Ky. 300; Abbott *v.* Omaha Smelting Co., 4 Neb. 416.

[2] Mokelumne Hill &c. Co. *v.* Woodbury, 14 Cal. 424, 426. The doctrine of this case and of the text is supported by the following cases: Abbott *v.* Omaha Smelting &c. Co., 4 Neb. 416; Granby Mining Co. *v.* Richards, 95 Mo. 106, 111; Kaiser *v.* Lawrence Savings Bank, 56 Iowa, 103, 109.

[3] Mich. Comp. Laws, § 3355.

[4] Attorney-General *v.* Hanchett, 42 Mich. 436.

[5] Abbott *v.* Omaha Smelting &c. Co., 4 Neb. 416.

[6] Childs *v.* Hurd, 32 W. Va. 66; 9 South East. Rep. 362.

judge, and having the act of incorporation duly recorded;[1] *publishing* the articles of association, and filing a certificate of the purposes of the organization.[2] - - - - But if a charter is conferred upon a body of persons named, in words which purport that the grant is to *take effect immediately*, and there is also a proviso that the corporation shall commence business within a given time, this proviso is not a condition precedent, and does not prevent the corporation from coming into existence prior to the time when it commences operations, though it has been thought that it would limit the duration of the corporation, if it should not commence operations within the time designated.[3] But it is submitted that even this would not happen unless the State should move for a judgment of ouster. - - - - So, when Section 2 of the Ohio act to provide for the creation and regulation of incorporated companies[4] has been complied with, the corporators and their associates become a body corporate, and its existence does not depend upon the *election* of, or the right to elect, *directors*.[5] - - - - The same has been held of the failure to serve *a notice of the first meeting* upon each corporator, in accordance with the law of the State, when it appears that the powers conferred by the charter have been assumed by the persons by whom it was intended they should be enjoyed;[6] and so of the failure to take a *bond* of the treasurer of a manufacturing corporation.[7]

§ 228. Defects in the Articles or Certificate which do not Vitiate. — The following irregularities in articles of association or certificate of incorporation have been held not sufficient to prevent the incorporation: the failure of the *notary* to *certify* that those signing the articles of incorporation were personally known to him;[8] the failure of the *affidavit* annexed to the articles of association to state that the *payment* of the ten per cent. of the capital stock, required by the statute, had been made "to the directors," and "in good faith," as both will be implied;[9] omitting to state the *residence* of the corporators;[10]

[1] Spencer *v.* Cooks, 16 La. Ann. 153.

[2] Bigelow *v.* Gregory, 73 Ill. 197. But see *post*, § 244.

[3] Cheraw &c. R. Co. *v* White, 14 S. C. 51; Cheraw &c. R. Co. *v.* Garland, 14 S. C. 63.

[4] Swan & C., Oh. St. 271.

[5] Ashtabula &c. R. Co. *v.* Smith, 15 Oh. St. 328.

[6] McClinch *v.* Sturgis, 72 Me. 288; Braintree Water Supply Co. *v.* Braintree, 146 Mass. 482, 486; Newcomb *v.* Reed, 12 Allen (Mass.), 362; Walworth *v.* Brackett, 98 Mass. 98.

[7] Boston &c. Co. *v.* Moring, 15 Gray Mass.), 211.

[8] People *v.* Cheeseman, 7 Col. 376.

[9] Buffalo &c. R. Co. *v.* Hatch, 20 N. Y. 157.

[10] State *v.* Foulkes, 94 Ind. 493; Rogers *v.* Danby Universalist Society, 19 Vt. 187.

omitting to *refer to the statute* under which the corporation is organized;[1] failing to *name the directors* in the articles of association, where they are drawn up (under a special charter) with the view of being adopted at the first meeting at which the directors are to be elected;[2] *antedating* the articles of incorporation by the Secretary of State at the time of their filing;[3] *signing* by the initial letter of the Christian name, instead of using the full prænomen;[4] the use of a *double comma* (, ,) following the name of a subscriber, under the name of a certain specified locality, for the purpose of designating the subscriber's *residence;*[5] failing to state that the subscribers constitute an existing society with *rules* and *regulations*, or that the trustees named were chosen in accordance with such rules and regulations;[6] failing to set forth, in so many words, that more than one thousand dollars per mile have been subscribed, as required by a statute providing for the incorporation of railway companies, where the articles stated that $84,100 had been in good faith subscribed and ten per cent. thereof paid in, and it otherwise appeared that the length of the proposed road was about seventy-five miles.[7] - - - - Where the governing statute requires the certificate of incorporation to state "the amount of the capital stock," this is sufficiently complied with, for the purposes of a collateral proceeding, by a certificate which states that "said capital stock shall consist of 500 shares at $100 per share."[8] - - - - Where the governing statute provided that the certificate of incorporation should state "the term of its existence, not to exceed forty years," and the certificate stated such term to be "at least forty years," this was held sufficiently definite, in an action against a stockholder on an assessment.[9] - - - - It is not necessary, under the general corporation act of Maryland in force in the year 1870, that the *particular trade* which a manufacturing company intends to carry on shall be stated in the *name* of the company, as recited in the certificate of incorpora-

[1] Rogers *v.* Danby Universalist Society, *supra.*

[2] Eakright *v.* Logansport &c. R. Co., 13 Ind. 404.

[3] State *v.* Foulkes, 94 Ind. 493.

[4] State *v.* Beck, 81 Ind. 500.

[5] Steinmetz *v.* Versailles &c. Turnpike Co., 57 Ind. 457.

[6] Roman Cath. Orphan Asylum *v.* Abrams, 49 Cal. 455.

[7] Buffalo &c. R. Co. *v.* Hatch, 20 N. Y. 157. Articles of association providing that the subscribers should construct a turnpike road, describing the location of the road, specifying the name of the company, fixing the amount of its capital stock and the number of shares, and containing a promise on the part of each subscriber to pay twenty-five dollars for each share subscribed for,—have been held a sufficient compliance with the statute of Indiana for the formation of such a company. Wert *v.* Crawfordsville &c. Co., 19 Ind. 242.

[8] Hughes *v.* Antietam Man. Co., 34 Md. 316.

[9] *Ibid.*, p. 324.

tion.[1] - - - - Where the statute required that there should be annexed to the articles of incorporation an affidavit "setting forth in substance that said amount of stock has been subscribed, and that ten per cent. in cash thereon has been actually and in good faith paid in as aforesaid," and the affidavit stated that ten per cent. "in cash had been actually paid in," but omitted the words "in good faith," and it appeared that the body of the certificate recited that ten per cent. of the amount subscribed had been actually, "in good faith, paid thereon in cash," and the certificate and affidavit were in all other respects regular, it was held that it was not invalid, so that the State could sustain an information against the corporation to vacate its franchise, by reason of the omission from the affidavit of the words "in good faith."[2]

§ **229. Claiming More than the Law Allows.** — The mere fact that the adventurers, in drawing their articles of association, claim greater powers or privileges than the governing statute allows, will not necessarily prevent them from becoming incorporate, since the law will reject the excessive claim as surplusage.[3] In such a case all the acts done in pursuance of the illegal matter will be invalid, but the title of the corporation, as to all matters authorized by the statute, cannot be impeached collaterally by reason of the illegal matter.[4] Thus, where the governing statute provided among other things that the term of existence of corporations formed under it shall not exceed twenty years,[5] and the articles of association provided for a term of existence for the corporation of fifty years, it was held, in a proceeding by *quo warranto*, that this was no ground of ouster before the expiration of the twenty years. It did not prevent the corporation from coming into existence. It could not, without renewal, live for fifty years, but it might exercise the rights and privileges of a corporation for twenty years.[6] So, the articles of association of a plank road company, under a general law of New York,[7] were not void because they contained a provision authorizing the directors of the company to *increase* its capital stock without the

[1] Hughes *v.* Antietam Man. Co., 34 Md. 316.

[2] People *v.* Stockton &c. R. Co., 45 Cal. 306, 312.

[3] Albright *v.* Lafayette &c. Asso., 102 Pa. St. 411.

[4] Albright *v.* Lafayette &c. Asso., 102 Pa. St. 411.

[5] Colo. Gen. Stat., § 238.

[6] People *v.* Cheeseman, 7 Colo. 376.

[7] N. Y. Laws of 1847, ch. 210, § 40.

consent of a majority in amount of the stockholders, as required by the statute. It was said that all the acts of the directors pursuant to such a provision would be void; but yet it was held that, the articles being in other respects in accordance with law, the existence of such a clause did not prevent the association from becoming incorporate.[1]

§ 230. **Provision as to Expulsion of Members.** — From the very nature of the case, no corporation can prevent a purchaser of stock from becoming a member, when he purchases the shares in the manner prescribed by the governing statute.[2] Nor can any action of such a corporation prevent its shareholders from disposing of their shares in the manner prescribed by law, and thereupon ceasing to be members of the corporation.[3] With this conception of the nature of joint-stock companies in view, it is an easy transition to the conclusion that a clause in a general statute relating to the formation of corporations, providing that the articles of association shall state "the methods and conditions upon which members shall be accepted, discharged, or expelled,"[4] —does not apply to a stock corporation, and that the omission of such statement from the articles does not affect the validity of its incorporation; especially where the same section further provides that, "in stock corporations, persons holding stock according to the regulations of the corporation, and they only, shall be members."[5]

§ 231. **Specifying the Objects of the Association.** — The articles of incorporation must specify the objects of the association in substantial compliance with the governing statute.[6] Where the law requires the articles of association to state distinctly and definitely the purpose for which it is formed, if they

[1] Eastern Plank Road Co. *v.* Vaughn, 14 N. Y. 546.

[2] Re Klaus, 67 Wis. 401; Edgerton Tobacco Man. Co. *v.* Croft, 69 Wis. 256, 259; *post*, § 2300.

[3] *Ibid.*

[4] Rev. Stat. Wis. 1878, § 1772.

[5] Edgerton Manuf. Co. *v.* Croft, 69 Wis. 256; *s. c.* 34 N. W. Rep. 143; 2 Rail. & Corp. L. J. 452.

[6] In some cases it is said that this must be done in *strict compliance* with the governing statute. West *v.* Bullskin Prairie Ditching Co., 32 Ind. 138; O'Reiley *v.* Kankakee Valley Draining Co., 32 Ind. 169. But, as elsewhere seen, this is not the general view. *Ante*, § 224, *et seq.*

do not so state, or if they do not state a purpose for which the statute authorizes a corporation to be formed, it will not be legally incorporated, and its articles will afford no warrant for the exercise of corporate action.[1] The purpose and intent of the incorporation must be ascertained solely from the articles, and it has been said cannot be aided, varied or contradicted by evidence outside the instrument itself.[2]

§ **232. Illustrations.** — Where the statute provided that the certificate of incorporation should set forth "the objects for which the company shall be formed," it was held that a certificate which stated that "the objects for which the said company is formed are as follows, namely, the mining of gold, silver and lead in the Territory of Utah," was sufficient.[3] - - - - Under a statute requiring the purpose of the incorporation to be distinctly and definitely stated, a statement that the purpose was "to put up, pack, and manufacture for market, Detroit river and lake ice, and to distribute and sell the same, was held sufficient, in a proceeding by the State to oust the company of its franchises.[4]

§ **233. Stating the Place where the Business of the Corporation is to be Carried on.** — Where the statute provided that if the company is formed "for the purpose of carrying on any part of its business in any place out of this State, the said certificate shall *so state;* and shall also state the name of the town and county in which the principal part of the business of said company within this State is to be transacted," — it was held that a certificate which stated that "the said company is formed for the purpose of carrying on some part of its business outside the State of New York, — namely, in Big Cottonwood District, Utah, and the name of the place in which the principal part of the business of said company is to be transacted is in the city and county of New York," — was a sufficient compliance with the statute.[5] But a statute requiring a certificate of incorporation

[1] Attorney-General *v.* Lorman, 59 Mich. 157.

[2] *Ibid.; post,* § 236. But see Buffalo &c. Co. *v.* Hatch, 20 N. Y. 157.

[3] People *v.* Beach, 19 Hun (N. Y.), 259.

[4] Attorney-General *v.* Lorman, 59 Mich. 157.

[5] People *v.* Beach, 19 Hun (N. Y.), 259. The court said: "If the mining was to be carried on in this State, the name of the town would be a sufficient designation as to the particular locality. The statute manifestly contemplates only certainty in this regard to a common intent. The précise, exact

to state the name of the city, or town and county, in which the principal place of business is to be located, is not complied with by a certificate which states that the operations of the corporation are to be carried on in the county of Calaveras, State of California, because this does not state the city or the town.[1]

§ 234. Stating the Manner of Carrying on the Business. — A certificate of incorporation, which sets forth that "the manner of carrying on the business shall be such as the association may from time to time prescribe," is not a compliance with a statute which requires the certificate to show "the manner of carrying on the business of said association." "Such an organization is too loose, indefinite, and uncertain. An association through which large sums of money are to be collected and disbursed, for benevolent or any other purposes, should be constructed on a more substantial foundation."[2]

§ 235. Provision as to Manner of Payment of Stock. — A provision in a statute that the "charter" shall set forth "the time when and the manner in which the stock shall be paid for," is satisfied by a charter which requires that the stock shall be paid for in cash, and that no certificate of stock shall issue until this payment is made.[3] So, where, under the same law, the charter declared "that the stock shall be paid in cash at such times and such amounts and with such notices to the subscribers as the managers and directors shall deem best for all parties in interest," — this was held a substantial compliance with the law.[4]

§ 236. Fatal Defects not Supplied by Parol Evidence. — Where the certificate of incorporation is fatally defective in omitting some essential recital prescribed by the governing statute,

point of location was not required or expected to be stated. A town embraces considerable territory, often in our own State, with a moderately dense population, from thirty to fifty square miles. Thus, it is seen that it was not necessary to be very particular in giving the place where the business was to be conducted. So, such place, when out of the State, might be given by equally general reference." People *v.* Beach, 19 Hun (N. Y.), 259, 262.

[1] Harris *v.* McGregor, 29 Cal. 124.

[2] State *v.* Central Ohio &c. Asso., 29 Ohio St. 399, 407.

[3] New Orleans &c. R. Co. *v.* Frank, 39 La. Ann. 707; *s. c.* 30 Am. & Eng. R. Cas. 275; 2 South. Rep. 310.

[4] Baltimore &c. Tel. Co. *v.* Morgan's &c. Co., 37 La. Ann. 883.

the defect cannot, it has been held, be healed by parol evidence.[1] Thus, where the articles omitted to state that a majority of the members of the association were present and voted at the election of directors, it was held that proof could not be admitted, in a proceeding by the State to vacate the franchises of the corporation, that a majority were in fact present and did so vote.[2] The alleged corporation can neither make out its corporate character, nor enlarge the effect of the certificate, by this species of evidence.[3]

§ 237. Acknowledgment of Articles. — Under the general corporation act of Maryland, in force in the year 1870, it was held that the acknowledgment of the certificate of incorporation by *all* the subscribers was not required. An acknowledgment by *five* or more was sufficient.[4] It was also held that an acknowledgment by the president and directors for the first year was not required.[5] Some of the statutory schemes of organization contemplate that an election of officers shall precede the filing of the instrument of incorporation, and that the instrument shall be authenticated by the signatures of the officers thus elected.[6]

§ 238. Amendment of the Articles or Certificate. — Upon principles stated in a former chapter with reference to special charters,[7] if the certificate of incorporation is *materially altered* after one has signed it as subscriber for a given number of shares, without the consent of such subscriber, it will release him from his contract of subscription at his election, because it makes for him a different contract from the one to which he assented.[8] The charter of a corporation organized under a gen-

[1] People *v.* Selfridge, 52 Cal. 331; Hallett *v.* Harrower, 33 Barb. (N. Y.) 537; Attorney-General *v.* Lorman, 59 Mich. 157.

[2] People *v.* Selfridge, *supra.*

[3] Hallett *v.* Harrower, *supra.*

[4] Hughes *v.* Antietam Man. Co., 34 Md. 316.

[5] *Ibid.*

[6] Officers chosen at the first meeting of a joint-stock company, established by voluntary association under Mass. Stat. 1851, ch. 133, may sign the certificate required by section 4; the requirement of Rev. Stat. Mass. ch. 38, §§ 3, 4, is not applicable thereto. Boston &c. Co. *v.* Moring, 15 Gray (Mass.), 211.

[7] *Ante,* § 71, *et seq.*

[8] Burrows *v.* Smith, 10 N. Y. 550.

eral law is embodied in its articles of association and in the general law; [1] and the articles of association, cannot, it has been said, be changed without the *unanimous consent* of the shareholders, — at least of such shareholders as have vested rights [2] in the corporation. The question has arisen in respect of *building associations*, and it has been held that where the articles of such an association do not authorize the corporation to *wind up* and close its existence short of eight years, unless all the stock is redeemed at its value, such an association cannot *dissolve* itself, by a resolution passed at a corporate meeting, without the consent of all the shareholders.[3] If the statute points out the steps to be taken in order to amend the articles, its provisions must of course be followed. But if the statute is silent, it is a sound conclusion that, in order for such an amendment to be good, the amended articles must be drawn up, signed, acknowledged and filed as required by the statute in the case of original articles.[4] If the governing statute does not provide for an amendment of the certificate of incorporation, articles of association, or other instrument of incorporation, any attempted amendment must have the substantial effect of a *reincorporation;* so that the existence of the corporation will date from the amendment, and will not date by relation from the filing of the original and abortive instrument.[5] The reasoning is that, if the defects are radical, the original instrument is wholly inoperative and void, and affords no basis for an amendment without the aid of an enabling statute. This reasoning would not, it is assumed, prevent the amendment of the articles from taking effect by relation, in respect of omissions not of an essential or radical character. Where the governing statute [6] provides that the original articles shall be recorded in a certain way, and another section of the same statute [7] authorizes the amendment of the original articles for any purpose which might have been provided therein, and requires that a certificate of such amendment, executed as speci-

[1] *Ante*, § 216.

[2] Bergman *v.* St. Paul &c. Asso., 29 Minn. 275.

[3] Barton *v.* Enterprise &c. Asso., 114 Ind. 226; *s. c.* 5 Am. St. Rep. 608. See Endlich Build. Asso. § 479.

[4] Day *v.* Mill Owners' Mut. Fire Ins. Co., 75 Iowa, 694; 38 N. W. Rep. 113; 18 Ins. L. J. 750.

[5] Matter of N. Y. Cable R. Co., 109 N. Y. 32.

[6] Here, Rev. Stat. Wis., § 1772.

[7] *Ibid.*, § 1774.

fied in that section, shall be recorded in the office where the original articles are recorded, — it is held that an amendment increasing the capital stock is inoperative until the certificate of amendment is left for record with the register of deeds of the proper county.[1]

§ **239. Filing, Publishing and Recording Articles.** — Where a general law provides that persons may become a body politic and corporate upon complying with the provisions of the law, one of which is that, before any such corporation shall commence business, its articles of association shall be published in a certain way, and the certificate of the purposes of the organization shall be filed in certain public offices, the performance of these acts is a necessary prerequisite to the existence of such corporation, for the purpose of relieving the corporators from individual liability.[2] It has been said that the mere signing of articles of association by parties proposing to form a manufacturing corporation, does not create such a corporation. The subscribers must also make, sign and acknowledge the certificate of incorporation prescribed by the governing statute, and must file the same in the recorder's office of the proper county, as there required, and must also file a duplicate thereof in the office of the Secretary of State. Until these steps have been taken, in one view, the corporation has no legal existence.[3] So, in Illinois the act of *recording* the certificate with the recorder of the county is regarded as a necessary and final act which gives to the organization its corporate life, and endows it with its corporate franchises and faculties; and until this is done there is no corporation capable of

[1] Wood *v.* Union Gospel Church &c. Asso., 63 Wis. 9, 13. And, incidentally, it is held that a complaint averring that such certificate has not been filed is equivalent to an averment that it has not been left for record. *Ibid.*

[2] Bigelow *v.* Gregory, 73 Ill. 197; overruling, it seems, Cross *v.* Pinckneyville &c. Co., 17 Ill. 54; Diversey *v.* Smith, 103 Ill. 378; Gent *v.* Manufacturers &c. Ins. Co., 107 Ill. 652; Ricker *v.* Larkin, 27 Bradw. (Ill.) 625; Indianapolis &c. Mining Co. *v.* Herkimer, 46 Ind. 142; Clegg *v.* Hamilton &c. Co., 61 Iowa, 121; Kaiser *v.* Savings Bank, 56 Iowa, 104; Cresswell *v.* Oberly, 17 Bradw. (Ill.) 281; Field *v.* Cooks, 16 La. An. 153; Garnett *v.* Richardson, 35 Ark. 144; Hurt *v.* Salisbury, 55 Mo. 310; Childs *v.* Hurd, 32 W. Va. 66; *s. c.* 9 South East. Rep. 362.

[3] Indianapolis &c. Mining Co. *v.* Herkimer, 46 Ind. 142.

transacting business or incurring liabilities.[1] So, where a corporation, instead of publishing the *notice* required by the governing statute,[2] published its articles of incorporation, and it did not appear from them when the corporation was to begin and end, nor where its principal place of business was to be, — it was held that this was not a substantial compliance with the statute, and that the stockholders remained liable for the debts of the concern as partners.[3] But the *delivery* of the articles to the officer whose duty it is to put them on file, may be proved by *evidence* other than his indorsement.[4] The *date* of filing is no part of the articles, and therefore may be proved by parol, regardless of the statute provision for the proof of the articles.[5] The failure of the probate judge, upon request, to make the statutory certificate, does not, in Alabama, prevent the corporation from coming into existence, if the proper antecedent steps have been taken.[6]

§ **240. Filing Copy with Secretary of State, etc.** — But where the other steps required by the statute are complied with, the failure to file with the Secretary of State a *duplicate* or *copy* of the certificate or articles of incorporation, will not vitiate the organization.[7] But here, as in other cases, the language of the governing statute must be carefully kept in view.[8] Thus, under a statute of Missouri, which made it the duty of the officers of the intended corporation to file a copy of the articles of association with the Secretary of State, and which provided that "the corporate existence of such corporation shall date from the time

[1] Cresswell *v.* Oberly, 17 Bradw. (Ill.) 281.

[2] Code of Iowa, § 1063.

[3] Clegg *v.* Hamilton &c. Co., 61 Iowa, 121.

[4] Johnson *v.* Crawfordsville &c. R. Co., 11 Ind. 280. That this is the proper conception of a "filing," see Engleman *v.* State, 2 Ind. 91.

[5] *Ibid.*

[6] Sparks *v.* Woodstock Iron & Steel Co., 87 Ala. 294; 6 South. Rep. 195.

[7] Mokelumne Hill &c. Co. *v.* Woodbury, 14 Cal. 424; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Hyde *v.* Doe, 4 Sawy. (U. S.) 133; Re Shakopee Man. Co., 37 Minn. 91; *s. c.* 33 N. W. Rep. 219; First Nat. Bank *v.* Davies, 43 Iowa, 424; Baker *v.* Neff, 73 Ind. 68; Williamson *v.* Kokomo &c. Asso., 89 Ind. 390.; Portland &c. Turnpike Co. *v.* Bobb, 88 Ky. 226; *s. c.* 10 S. W. Rep. 794; Guadalupe &c. Asso. *v.* West, 70 Tex. 391; Van Pelt *v.* Association, 79 Ga. 439. Compare Spring Valley Water Works *v.* San Francisco, 22 Cal. 434. The Illinois cases are distinguished in Bigelow *v.* Gregory, 73 Ill. 197, 201.

[8] As was pointed out in Granby Mining Co. *v.* Richards, 95 Mo. 106.

of filing said copy of such articles," — it was held that, until the officers took this final step, the corporation did not exist, and had no power to execute a written obligation, and that such pretended obligation could not be made the foundation of an action against the supposed corporation.[1]

§ **241. Illustrations.** — Where the governing statute provides that "the corporation may commence business as soon as the articles are filed for record in the office of the county court clerk," its organization is not invalidated by its failure to comply with another portion of the statute which requires the filing of a *copy* of its articles in the office of the *Secretary of State* within three months; since the statute evidently intends that it shall commence business as a corporation as soon as the articles are filed in the clerk's office.[2] - - - - So, where the terms of a special act of incorporation are, — "when such special company or companies are created and organized, a certificate shall, in writing, be filed," etc., — here the literal reading of the statute imports that the corporation shall be organized first, and that the filing of the certificate is a subsequent duty to be performed by its officers. In such a case the failure to file the certificate is not fatal to the existence of the corporation, and cannot be raised in a collateral proceeding questioning the existence of the corporation.[3] - - - - So, a statute of Minnesota,[4] provides that, "before any corporation, formed and established by virtue of the provisions of this act, shall commence business, the president and directors thereof shall" do certain things, among others deposit with the Secretary of the State a duplicate *copy* of its certificate of incorporation. But, as a subsequent section of the same statute,[5] imposes a personal liability on the officers of "such corporation" for failing to perform this duty, — it was justly concluded that the legislature did not intend that the corporation should not exist until this had been done.[6] - - - - So, in an action by a banking association in New York, the original certificate, recorded in the county clerk's office, with proof that the association had done business and issued bills which

[1] Hurt *v.* Salisbury, 55 Mo. 311. See also Richardson *v.* Pitts, 71 Mo. 128. As to the *fees* to be paid on such filing: Gen. Laws Minn. 1889, ch. 197; Laws Colo. 1885, p. 153; construed in Edwards *v.* Denver &c. R. Co., 13 Colo. 59; *s. c.* 21 Pac. Rep. 1011.

[2] Walton *v.* Riley, 85 Ky. 413; *s. c.* 3 S. W. Rep. 605 (overruling Heinig *v.* Adams &c. Co., 81 Ky. 300).

[3] Granby Mining &c. Co. *v.* Richards, 95 Mo. 106.

[4] Minn. Gen. Stat. 1881, chap. 34, § 28.

[5] *Ibid.*, § 141.

[6] Re Shakopee Man. Co., 37 Minn. 91; *s. c.* 33 N. W. Rep. 219. To the same point under the Wisconsin statute, see Harrod *v.* Hamer, 32 Wis. 162.

were countersigned, is sufficient evidence of its due organization, without direct proof that the certificate of incorporation was filed in the office of the Secretary of State.[1]

§ **242. Recording in the Wrong Book.** — It has been held, and on grounds which seem obviously correct, that the organization of a corporation is not invalidated from the fact that the clerk of the county court, in whose office the articles are lodged for record, commits the mistake of recording them in the wrong book, — as, for instance, in the book provided by law for the recording of deeds.[2]

§ **243. Fraudulent and Surreptitious Recording.** — A private corporation can only be created through the *voluntary action* of its projectors in accepting a grant of franchises from the State. This voluntary action is in the nature of a contract among the projectors. This necessarily implies that, unless the projectors *assent* to the doing of the acts necessary to call the corporation into existence, it does not exist. As fraud vitiates all engagements, if one of the essential steps prescribed by law is taken by one of the projectors *fraudulently* and *without the consent* of the others, so that the corporation in fact appears to exist, but is in appearance called into existence prior to the time when the corporators intended that its existence should commence, — and if these things are shown in an appropriate judicial proceeding, it will be held that there is no corporation. Thus, under a statute of Illinois, where it is held that the recording of the certificate of organization in the office of the recorder of deeds is a prerequisite to the organization of the corporation,[3] it has been also held that, where such paper is fraudulently and surreptitiously recorded by one of the projectors, contrary to the agreement had among themselves, the record is of no effect, and the corporation is not brought into existence.[4]

[1] Leonardsville Bank *v.* Willard, 25 N. Y. 574.

[2] Walton *v.* Riley, 85 Ky. 413; *s. c.* 3 S. W. Rep. 605.

[3] *Ante*, § 239.

[4] Ricker *v.* Larkin, 27 Bradw. (Ill.) 625. Where a *deed* has been obtained surreptitiously and placed upon record by the grantee nothing short of an explicit ratification of it, or of such acquiescence, after a knowledge of the facts, as would raise a presump-

§ 244. Non-compliance with Provisions Directing Publication of Articles. — Many of the statutes, with the view of giving *publicity* to the fact of the organization of the corporation, prescribe that the certificate, which sets forth its objects and purposes, shall be *published* in certain newspapers, or in some other way. Perhaps the statute of Minnesota,[1] may be referred to as a type of such statutes. It provides that "before any corporation, formed and established by virtue of the provisions of this act, shall *commence business*, the president and directors thereof, shall cause their articles of association to be published at full length, in two newspapers published in the county in which such corporation is located, or at the capital of the State." The act of which this is a part relates to the organization of manufacturing corporations. The making of such a publication is not a condition precedent to the coming into existence of the corporation.[2]

§ 245. Provision as to Assent and Approbation of a Judge.— A statute [3] relating to the organization of benevolent, charitable and other like societies, authorized five or more persons to make, sign, acknowledge or file a certain certificate and added that the certificate should not be filed unless by the written consent and approbation of a justice. It was held that the Secretary of State was not, under a just interpretation of the statute, concluded from questioning the objects of the society, by the fact that it had secured the written consent and approbation of the proper justice of the Supreme Court, as provided by the statute. It was accordingly held that he might refuse to file in his office a certificate of the incorporation of the stated number of persons, expressing the objects of the incorporation, though in due form under the statute, and having such consent and approbation indorsed.[4]

§ 246. Subscription of the Whole Amount of the Capital Stock. — A subscription of the whole amount of the capital stock is not a condition precedent to the legal existence of the

tion of an express ratification, can give it vitality. Hadlock *v.* Hadlock, 22 Ill. 384. See also Illinois &c. R. Co. *v.* McCullough, 59 Ill. 166.

[1] Rev. Stat. Minn. 1881, chap. 34, § 128.

[2] Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568.

[3] N. Y. Act of 1848, chap. 349.

[4] People *v.* Nelson, 3 Lans. (N. Y.) 394; *s. c.* 10 Abb. Pr. (N. S.) (N. Y.) 200; *s. c.* affirmed, 46 N. Y. 477.

corporation, unless it is made such in terms by the governing statute.[1] Under a statute making it an essential prerequisite to the valid organization of a corporation that stock to a certain

[1] Schenectady &c. Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Hamilton &c. Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 166; Waterford &c. R. Co. *v.* Dalbiac, 20 L. J. Exch. 227; *s. c.* 4 Eng. L. & Eq. 455; Johnson *v.* Kessler, 76 Iowa, 411; *s. c.* 41 N. W. Rep. 57. See, also, Ernst *v.* Water-works Co., 39 La Ann. 550; State *v.* Railroad Co., 24 Neb. 143; Appeal of Scranton Electric Light & Heat Co., 122 Pa. St. 154; State *v.* Canal Co , 40 Kan. 96. It is obvious that if the terms of the statute render the filling up of the subscription list necessary to enable the company to make calls, until the stock is all filled up they can not maintain an action upon a subscription. Norwich &c. Nav. Co. *v.* Theobald, 1 Mood. & Malk. 151; Salem Mill Dam Corp. *v.* Ropes, 9 Pick. (Mass.) 187; *s. c.* 6 Pick. (Mass.) 23; *post*, §1137; Central Turnp. Corp. *v.* Valentine, 10 Pick. (Mass.) 142. Where the act of incorporation of a bank provided, "that the capital stock of said corporation *may* consist of five hundred thousand dollars, divided into shares of ten dollars each, and shall be paid in the following manner, that is to say: one dollar on each share at the time of subscribing, one dollar on each share at sixty days, and one dollar on each share ninety days after the time of subscribing; the remainder to be called for as the president and directors may deem proper," — it was held that it was not a condition precedent to the corporate existence of the bank that the whole potential stock should be subscribed for. Minor *v.* Mechanics Bank, 1 Pet. (U. S.) 46, 63. A bank incorporated with the privilege of creating a stock of not less than one sum, nor greater than another, may commence business with the smaller capital, and afterwards increase it to the larger. Gray *v.* Portland Bank, 3 Mass. 364. The certificate required by Mass. Stat. 1851, ch. 133, § 4, may be filed in the office of the Secretary of the Commonwealth, before any part of the capital stock is paid in. Boston &c. Co. *v.* Moring, 15 Gray (Mass.) 211. Under the statutes of Texas, a legal organization of a corporation may take place although its stock may not be subscribed or paid for. When a corporation files its articles of association with the Secretary of State, it becomes a corporation in law, and the owners of the stock and the managers of its business can not be held liable as partners for its debts. National Bank *v.* Texas Investment Co., 74 Tex. 421; *s. c.* 12 S. W. Rep. 101; citing: Powder Co. *v.* Sinsheimer, 46 Md. 315; Society Perun *v.* Cleveland, 43 Ohio St. 481, 3 N. E. Rep. 357; Bank *v.* Almy, 117 Mass. 476. The Nebraska general incorporation act does not authorize corporations formed under it to commence business before the whole capital stock has been subscribed, and until this is done they cannot maintain an action on a stock subscription. Livesey *v.* Omaha Hotel Co., 5 Neb. 50. Compare New Haven &c. R. Co. *v.* Chapman, 38 Conn. 56. A corporation which has been duly organized, in pursuance of the laws of Kansas, has the power to transact such business as its charter contemplates, although the entire amount of the capital stock, as fixed by the charter, has not yet been subscribed for or taken. Massey *v.* Citizens' Building &c. Assoc., 22 Kan. 624. Not necessary, under Alabama

amount shall be subscribed, the subscriptions must have been made *in good faith* by persons having a reasonable expectation of being able to pay, in order to show a corporate organization in a proceeding by *quo warranto*.[1] But where the question of the regularity of the organization is raised in a collateral proceeding, it is not admissible to show the insolvency of subscribers to the stock,[2] — as in a suit by the corporation upon an unconditional subscription to its stock.[3] But there are cases which hold that an assessment against a subscriber to stock cannot be collected until the minimum amount required by the statute has been subscribed, by persons apparently able to pay. In such cases the subscriptions of insolvents and of persons incapable of contracting are not counted in arriving at the amount.[4]

§ **247. Payment of a Certain Amount of Capital Stock.** — Many of the statutes provide that a certain percentage of the capital stock named in the articles of association must be paid in before the articles are filed. According to one view the payment of this amount is not a condition precedent to incorporation, such as will be available in a collateral proceeding.[5] Clearly this is so where, by the terms of the governing statute, the actual payment of the capital is not required to precede the making and filing of the certificate. In such a case if a certificate, regular in form, has been made and filed, this will establish the existence of the corporation as to third persons.[6] Again, where something is required to be done by the governing statute within a stated period, and the corporation enters upon its business and continues in business as a corporation for a long time thereafter, — it will be *presumed*, in an action by the corporation on a note given for shares of its stock, that the thing required by the statute has been done.[7] Where the thing required by the statute to

statute, that the written declaration should provide that the unpaid portion be secured to be paid in fixed installments: Bolling *v.* Le Grand, 87 Ala. 482; *s. c.* 6 South. Rep. 332.

1 Holman *v.* State, 105 Ind. 569.

2 *Ibid.*

3 Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51.

4 Lewey's Island R. Co. *v.* Bolton, 48 Maine, 451; Phillips *v.* Covington &c. Bridge Co., 2 Met. (Ky.) 219.

5 Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; *post*, § 1216.

6 Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161.

7 Agricultural Bank *v.* Burr, 24 Me. 256, 265.

be done was the payment into the treasury of the corporation of fifty per cent. of its capital stock, in gold or silver, within six months after receiving its charter, the certificate of the commissioners was evidence that it had been done.[1] Since a *substantial* compliance with the conditions of the statute is all that the law requires, except in the case of conditions precedent,[2] it is generally held that, where the governing statute requires a certain percentage of the stock to be paid in, it will be sufficient that the aggregate sum produced by such percentage is paid in, and it will be immaterial *by whom* it is paid.[3] Where the charter of a corporation requires the payment of its capital stock *in cash*, and a subscriber, with the connivance of the directors and in fraud of the statute, executes his *promissory notes* to the corporation in settlement of his subscription, a court of equity will not relieve him from the payment of the notes, on the ground that the corporation had no power, under its charter, to accept notes in payment of stock subscriptions. In such a case whatever shift or device is resorted to for the purpose of evading the provisions of the act of incorporation, "a court of chancery will never permit it to be set up to defeat a recovery on those notes for the benefit of the creditors of the corporation, who are entitled to be first paid out of the trust property."[4]

[1] *Ibid.*

[2] *Ante*, § 224.

[3] Thus, under the general statute of New York authorizing the formation of railroad corporations, the condition precedent to incorporation, that, for every mile of road, there must be not less than $1,000 of the stock subscribed, and 10 per cent. paid thereon in good faith, is satisfied if the cash payments, by whomsoever made, amount in the aggregate to 10 per cent. upon $1,000 for every mile proposed to be made. Lake Ontario R. Co. *v.* Mason, 16 N. Y. 451. So, a railroad company was, by the legislature of South Carolina, created "a body politic and corporate." A subsequent section of the charter enacted "that when $100,000 shall have been subscribed, and $1 on each share shall have been paid in, the said company may organize and proceed to work." It was held that this requirement was sufficiently complied with when $100,000 was subscribed, and a sum *in gross* paid in equal to $1 upon every share subscribed. Spartanburg &c. R. Co. *v.* Ezell, 14 S. C. 281.

[4] McLaren *v.* Pennington, 1 Paige (N. Y.), 102, 112; *post*, § 1220. The provisions of the Georgia Code (§ 1676), that corporations shall not commence business until ten per cent. of the capital stock has been paid in, and that charters shall have no force after two years unless action shall have been taken, etc., apply only to charters granted by the courts, not to those granted by the legislature. Atlanta *v.* Gate City Gas-Light Co., 71 Ga. 106.

§ 248. Certificate of Treasury Board, Comptroller of Currency, etc., Conclusive. — Under a Canadian statute which makes the doing of certain things and the certificate of the treasury board that those things have been done, a prerequisite to the organization of a corporation, it is not competent, in winding up a corporation and in settling a list of the contributories, for the shareholders to impeach the certificate of the treasury board under which the corporation commenced business. Such a certificate is not only *prima facie*, but *conclusive* evidence that all previous requisites have been complied with.[1] It has been held that, even should the public officer appointed by law to grant such a certificate, *miscount the shares*, where there was not the statutory number, and so grant the certificate, it could not therefore be impeached.[2] In like manner, under the United States Banking Act, which provides that banking companies shall not commence business until they obtain a certificate from the comptroller of the currency, the validity of this certificate cannot be questioned in a collateral proceeding, but it is conclusive evidence of the organization of the bank, as against everybody except the government.[3] The reason is that where, by reason of such a certificate, a corporation is held out to the world as ready to undertake business, most disastrous consequences would follow to commercial undertakings, if any person was allowed to go back and enter into an examination of the circumstances attending the original incorporation.[4]

§ 249. Letters-Patent of Incorporation Conclusive Evidence of Corporate Existence. — In Canada a similar rule applies to *letters-patent* incorporating a company, — such letters-patent being held to be conclusive evidence that all the preliminary statutory requisites to incorporation have been complied with.[5]

[1] Re Central Bank of Canada, 25 Can. L. J. 238.

[2] Bird's Case, 1 Sim. (N. S.), 47.

[3] Casey *v.* Calli, 94 U. S. 673.

[4] Oakes *v.* Turquand, L. R. 2 H. L. 325; Peel's Case, L. R. 2 Ch. 684.

[5] Lake Superior Co. *v.* Morrison, 22 Can. C. P. 224.

CHAPTER VII.

REORGANIZATION.

§ 255. **Effect of Renewal of Charter.** — Judicial authority is found for the proposition that when the charter of a corporation is renewed in the manner provided by law, this has not the effect of creating a new corporation, but merely continues the existence of the old one.[1] And where the application for the renewal was, without fault of the corporation, delayed by the official to whom it was made, it was held that, when granted, it

[1] St. Philip's Church *v.* Zion Presb. Church, 23 S. C. 297.

related back so as to prevent a reverter of property.[1] The court proceeded upon the analogy of the rule that a sheriff's deed under circumstances may relate back to the time of the sale, although executed after the sale, so as to protect a defendant in possession.[2] Upon the principle that *grants* of corporate privileges and franchises are to be *construed strictly*,[3] it must follow that, where it is claimed that an act of the legislature, under which a corporation has been reorganized, absolves the new corporation from the liabilities of the old, this conclusion cannot be adopted unless it unmistakably appears in the language of the statute.[4] But an act of the legislature reviving the charter of a corporation may operate as a *waiver*, on the part of the State, of *penalties* incurred by the corporation on account of its failure to comply with conditions imposed upon it by its original charter, and *estop* the State from claiming the enforcement of those penalties.[5] It was so held where a suit was pending, at the time of the passage of the act reviving the charter, to enforce the rights which it was alleged had reverted to the State on account of the forfeiture.[6] Of course, the new corporation can have no powers except such as are derived from the statute authorizing the reorganization.[7]

§ 256. Distinction between the Revival of an Old Corporation and the Creation of a New one. — It is often a question of great importance whether an act of reincorporation has had the effect of merely reviving and continuing the old corporation, or of creating a new one; since, if it has the latter effect, the new corporation does not possess the rights, and is not subject to the liabilities of the old one.[8] If the act of reincorporation is under a special charter granted by the legislature, the charter must be

[1] *Ibid.*

[2] See Kingman *v.* Glover, 3 Rich. L. (S. C.) 27; Bank *v.* Manufacturing Co., 3 Strobh. L. (S. C.) 192.

[3] *Post*, Chs. 115, 124.

[4] Trustees *v.* Moody, 62 Ala. 389.

[5] Re Mechanics' Society, 31 La. An. 627.

[6] *Ibid.*

[7] Mayor *v.* Steamboat Co., R. M. Charlt. (Ga.) 342.

[8] Ang. & A. Corp. (11th ed.), § 780; Colchester *v.* Seaber, 3 Burr. 1866; Scarborough *v.* Butler, 3 Lev. 237; Rex *v.* Pasmore, 3 T. R. 241, 242, 246; Luttrel's Case, 4 Coke Rep. 87; Bellows *v.* Hallowell Bank, 2 Mason (U. S.), 43; Union Canal *v.* Young, 1 Whart. (Pa.) 410; Smith *v.* Morse, 2 Cal. 524, 554.

looked to for the purpose of solving this question.[1] If the act is accomplished by the action of the old corporation, through its proper officers or members, in filing a new certificate or other instrument of incorporation under a general law, then the question must be solved by reference to what they have done. In either case it becomes a question of *intent*.[2] Where it is to be determined upon the terms of a written instrument, *e.g.*, the charter, it is of course a *question of law* for the court;[3] but where it is to be gathered from facts and circumstances, it is, on principle, a question of *fact* for a jury. "The question of identity," said Randolph, J., "that is, whether the new act creates a new body politic or corporate, or merely revives an old one, is one of intention."[4] "To ascertain," says Story, J., "whether a charter creates a new corporation, or merely continues the existence of the old one, we must look to its terms, and give them a construction consistent with the legislative intent, and the intent of the corporators."[5] Accordingly, where a religious society, incorporated under a general law, hold a new election of trustees for the purpose of being reincorporated, if the object of the new election and certificate is to preserve, and not to change or dissolve the old corporation, — the new corporation will be held to be merely a continuance of the old.[6] Where a corporation has become *dormant* by reason of lapse of time a party claiming under its *recent deed* must, of course, assume the *burden* of showing that it has been reorganized in the manner

[1] Bellows *v.* Hallowell Bank, 2 Mason (U. S.) 43; Wyman *v.* Hollowell Bank, 14 Mass. 58.

[2] Marshall *v.* Western &c. R. Co., 92 N. C. 322, 330; Young *v.* Rollins, 85 N. C. 485.

[3] 1 Thomp. Trials, § 1065.

[4] Miller *v.* English, 21 N. J. L. 317, 324.

[5] Bellows *v.* Hallowell &c. Bank, 2 Mason (U. S.), 43.

[6] Miller *v.* English, *supra.* In Colchester Corp. *v.* Seaber, 1 Burr. 1866, it was held that, where a corporation, by the death of some of its members, becomes disabled to act, and the corporation hence dormant, and a new charter is granted, the acceptance of the new charter does not create a new corporation, but merely revives the old one. So in Haddock's Case, 1 Ld. Raym. 439, it was said that a new charter "does not merge or extinguish any of the ancient privileges, but the corporation may use them as before." To the same effect is Rex *v.* Pasmore, 3 T. R. 199, and 241. See also People *v.* Marshall, 6 Ill. 672, for the description of an act of the legislature which was held not to create a new, but merely to continue an old charter. Compare Union Manufacturing Co. *v.* Young, 1 Whart. (Pa.) 410.

pointed out by law.[1] It is held that where a State bank has, under the provisions of an enabling act of the State and of section 44 of the national banking act,[2] reorganized as a national bank, the identity of the corporation is not changed, and its obligations are not impaired. It remains substantially the same institution under another name and under a new jurisdiction. The change is a transition, and not a new creation.[3] And where the term of existence of a national banking association, which would otherwise have expired in 1883, was by act of Congress prior to that time extended twenty years longer, the identity of the old corporation is in no wise affected. It simply has a new lease of life.[4]

§ 257. Franchise to be a Corporation not the Subject of Judicial Sale. — The franchise to be a corporation is not the subject of sale and transfer, unless made so by a statute, which provides a mode for exercising it.[5] A franchise to be a corporation is distinct from a franchise, *as* a corporation, to

[1] Goulding *v.* Clark, 34 N. H. 148. Acts reincorporating municipal corporations do not have the effect of creating new corporations, but merely that of continuing the old ones. They do not, therefore, extinguish the duties or obligations of the precedent corporation. Smith *v.* Morse, 2 Cal. 524. See Hopkins *v.* Swansea, 4 Mees. & W. 621. The same principle applies in respect of other public corporations. Thus, as already stated (*ante*, § 25), the University of Alabama was early held to be a public corporation and subject to the control of the legislature of the State. More recently it was held that this corporation had not been dissolved, or a new corporation created in its stead, by force of subsequent legislation or of the constitution of 1868, but that its corporate rights and powers continued unimpaired. Trustees *v.* Moody, 62 Ala. 389. An act enabling a railroad company to take a new name and extend its road, is not an act renewing or extending its charter, or creating a new corporation. Attorney-General *v.* Joy, 55 Mich. 94.

[2] U. S. Stat. at Large, ch. 106, p. 112, § 44.

[3] Coffey *v.* National Bank, 46 Mo. 140; Grocers Nat. Bank *v.* Clark 48 Barb. (N. Y.) 26; Thorp *v.* Wegeforth, 56 Pa. St. 82.

[4] Nat. Exch. Bank *v.* Gay, 57 Conn. 224; *s. c.* 17 Atl. Rep. 555. See also Day *v.* Insurance Co., 75 Iowa, 694. Recent Michigan statutes relating to renewal of articles of association construed: Attorney-General *v.* Perkins, 73 Mich. 303; *s. c.* 41 N. W. Rep. 426.

[5] *Post*, Ch. 116. "The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible." Hoar, J., in Com. *v.* Smith, 10 Allen (Mass.), 448, 455. See also Hall *v.* Sullivan R. Co., 21 Law Rep. 138; *s. c.* 2 Redf. Am. Railw. Cas. 621; 1 Brun. Coll. Cas. 613.

carry on a certain business, *e.g.*, to maintain and operate a railway. The one is frequently designated as a *primary*, and the other as a *secondary* franchise. The latter is in the nature of private property, is vendible on execution, is the subject of a mortgage, and may pass to a purchaser at a foreclosure sale. But a mortgage of the franchises of a corporation, made in the exercise of a power given by statute, confers no rights upon the purchasers at a foreclosure sale to exist as the same corporation. The extent of the right which it confers upon them is to reorganize as a corporation, subject to the constitution and laws of the State existing at the time of the reorganization.[1] A cogent and practical reason in support of this conclusion is that, if the foreclosure sale had the effect of transferring the vitality of the old corporation to the new purchasers, it would necessarily dissolve the old corporation, which might have an injurious effect upon its creditors; or, if it should not operate to create such a dissolution, there would then be the anomalous instance of two corporations existing at the same time under the same charter; for, "after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet until there be such judgment, the rights of the corporators and of third persons may require that the corporation be considered as still existing."[2]

§ 258. Statutory Provisions under which the Reorganized Company Succeed to the Franchises of the Old.—Statutes exist in many of the States, by force of which, where the property and franchises of a corporation are sold to foreclose a mortgage, or otherwise for the purpose of paying the debts of the corporation, the purchaser is authorized or required to organize a new corporation to perform the public duties required of the old, which new corporation succeeds to

[1] Memphis &c. R. Co. *v.* Railroad Commissioners, 112 U. S. 609. Compare Acres *v.* Moyne, 59 Tex. 623; Stephenson *v.* Texas &c. R. Co., 42 Tex. 163. It was so held, where the governing statute empowered the company to borrow money "on the credit of the company and on the mortgage of its charter and works," and the mortgage in question undertook to pass both its charter and works. Memphis &c. R. Co. *v.* Railroad Commissioners, *supra*.

[2] Coe *v.* Columbus &c. R. Co., 10 Ohio St. 372, 386, per Gholson, J.; quoted with approval in Memphis &c. R. Co. *v.* Railroad Commissioners, 112 U. S. 609, 620.

the corporate rights and franchises of the old.[1] An example of such a statute is given in a recent work [2] from the statute books of the State of *New York*, as follows: "In case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation, except a street railroad company, created under the general railroad law of this State, or existing under any special or general act or acts of the legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction, made or given to execute the provisions or enforce the lien of any deed or deeds of trust or mortgage theretofore executed by any such company, the purchasers of such railroad property, or franchises, and such persons as they may associate with themselves, their grantees or assignees, or a majority of them, may become a body politic or corporate, and as such may take, hold and possess the title included in said sale, and shall have all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the Secretary of State a certificate duly executed under their hands and seals, and acknowledged before an officer anthorized to take the aknowledgment of deeds; in which certificate the said persons shall describe, by name and reference to the act or acts of the legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold; and shall also set forth," the name of the corporation, the capital stock, the number of directors, and the plans and agreements of reorganization.[3] "Every stockholder in any company, the franchises and property whereof shall have been sold as aforesaid, shall have the right to assent to the plan of readjustment and reoganization of interests, pursuant to which such franchises and property shall have been purchased as aforesaid, at any time within six months after the reorganization of said new company, and by complying with the terms and conditions of such plans, become entitled to his *pro rata* of the benefits therein, according to its terms." [4]

[1] For cases arising under such statutes, see Pittsburgh &c. R. Co. *v.* Fierst, 96 Pa. St. 144; Com. *v.* Central Passenger R. Co., 52 Pa. St. 506. Compare Wellsborough &c. Plank Road Co. *v.* Griffin, 57 Pa. St. 417.

[2] 2 Beach Railw., § 767.

[3] New York Laws of 1850, ch. 140, § 5, as amended by New York Laws of 1854, ch. 282, and by New York Laws of 1873, ch. 710; New York Laws of 1874, ch. 430.

[4] New York Laws of 1874, ch. 430, 3. See Pratt *v.* Munson, 84 N. Y. 582, as to the effect of the act of 1854 in repealing the prior statute of this

Referring to this statute, the Court of Appeals of New York say: "The first section provides that in case a railroad and the property, rights, privileges and franchises connected therewith shall be sold under a mortgage foreclosure, the purchasers, and such persons as they may associate with themselves, their grantees or assigns, may become a corporation, and as such may take, hold and possess the property and franchises sold, by executing and filing the certificate provided in the section. Under that section any number of persons may, at a foreclosure sale of a railroad and its franchises, purchase the property for themselves, and organize a new company, which will possess all the powers, rights, privileges and franchises of the prior corporation, and be subject to the provisions of the general railroad laws of the State. In such case the rights of all the stockholders of the prior corporation will be absolutely barred and cut off by the foreclosure and sale. But purchasers at such a foreclosure sale, instead of buying absolutely for themselves, may buy the property in pursuance of a plan, as mentioned in the second section of the act, for the readjustment of the respective interests therein of the mortgage creditors and stockholders of the company. Notwithstanding the formation of the plan, however, the foreclosure becomes absolute against the corporation, and all its rights and all the proprietary interests of the stockholders are absolutely barred and cut off. The entire property of the corporation passes under the sale as absolutely as

nature. The statute was further amended by the act of 1876, chapter 446, and the construction of the amended statute was involved in the case of Vatable *v.* New York &c. R. Co., 96 N. Y. 49; reversing *s. c.* 11 Abb. N. C. (N. Y.) 133. In another case it was said: "Before these acts were passed, such a railroad mortgage, while it certainly covered the special and peculiar franchises of the company, could with difficulty be construed to cover its corporate life, or right to be a corporation, and the subject created doubts. That right, it was argued, could scarcely be said to pass to a purchaser by virtue of his purchase, and could only be given by the authority of the State. Unless, therefore, the purchaser could find some corporate body in existence, capable of holding and exercising the franchises purchased, he stood in the awkward predicament of owning a property which it was not certain he could either use or sell. It was to cure this difficulty that the act of 1854 and its subsequent amendments were designed. In the absence of an existing corporation, capable of taking and exercising the franchises sold, the purchaser was authorized to create a new corporation, for the purposes of the transfer, but whose corporate life came from the grant and authority of the State. It is quite evident that this authority was intended only to meet a possible emergency, and not at all to prevent a sale or transfer to a *corporation already existing*, and capable, under the law of its creation, of holding the property and exercising the franchises which passed to the purchaser by the mortgage sale." People *v.* Brooklyn &c. R. Co., 89 N. Y. 75, 84.

it did under the prior statutes, and the plan has reference only to the new corporation to be formed, and to interests therein. If the property be purchased under the plan, then such plan must be embodied in the certificate to be filed as required by the first section, and then, as provided in section 3, every stockholder 'shall have the right to assent to the plan of readjustment and reorganization of interest, pursuant to which such franchises and property shall have been purchased as aforesaid, at any time within six months after the organization of said new company, and by complying with the terms and conditions of such plan, become entitled to his *pro rata* benefits therein, according to its terms.' So, after the foreclosure sale, the only property interest which a stockholder of the old company has left is in the surplus, if any, after satisfying the mortgage and other preferential claims. It is entirely optional with him whether he will come in under the plan and join the new company. All the statute secures to him is the option or privilege to join the new company by a compliance with the terms of the plan. If he elects to join the new company, then he gets the proportional interest therein, which may be of great value to him. But his right to join the new company, so far as it depends upon the statute, must be exercised within the six months. If he fails within that time to exercise his right by assenting to the plans and thus becoming a party thereto, he cannot take or claim any rights under the plans. It is clearly a condition precedent that he must signify his assent to the plan within six months. If he fails to do so, he forfeits no property, as that was swept away by the foreclosure sale; he loses simply the right or privilege to join and become interested in the new company and thus to acquire an interest in property. That is a forfeiture, if it can properly be so called, which the law imposes, and against which the courts can give no relief. In such a case equity cannot relieve him from the performance of the condition precedent, and thus vest him with rights of property which he did not otherwise have. It would lead to intolerable inconvenience, confusion and difficulty, if the stockholders of the old company could, in such a case, take their own time to assent to the plan of reorganization, and to assert their right to become members of the new company, upon such facts as they would be able to establish in a court of equity." [1]

§ 259. Further Statutory Provisions. — This statute has been considerably further amended. As given in the latest edition of the General Statutes of *New York*,[2] it permits purchasers and others asso-

[1] Vatable *v.* New York &c. R. Co., 96 N. Y. 49, 56, reversing *s. c.* 11 Abb. N. C. (N. Y.) 133; opinion by Earl, J.

[2] 3 Rev. Stat. N. Y. 1889 (Banks & Bros. ed.), p. 1735.

ciated with them, upon filing articles of association, to become a corporation, and empowers them to succeed to and take the franchises, privileges, etc., of any corporation organized by special act or under a general law of the State, whose property and effects have been sold under a mortgage.[1] The certificate must set forth the particulars required by the statute to be stated in the original certificate of incorporation.[2] Where the original corporation was organized under a special act, the certificate shall state: 1. The name of the corporation to be formed. 2. The amount of the capital stock, which shall not exceed that which the original corporation was authorized by law to have at the time of the sale. It shall also state the number of shares of which the stock shall consist. 3. It shall also state the title and date of passage of the act creating the former corporation, and any other acts relating to it. 4. It shall state the number of the directors, and shall give the names of the first board of directors of the new corporation.[3] This last provision implies that the new corporation is not organized and does not exist as a corporation until it has proceeded to the election of a board of directors, — a circumstance which seems to bring it within a rule declared in Ohio and Michigan in respect of consolidation under a statute of Ohio.[4] This certificate is to be executed in duplicate, acknowledged, and filed in the office of the Secretary of State, and one of the duplicates is to be filed in the county in which the first corporation had its principal place of business. The statute also contains a general statement to the effect that the franchise vested in the new corporation shall be as broad as those possessed by the old, whether from the terms of its governing statutes, or as already judicially construed.[5] A certified copy of the certificate from the office of the Secretary of State, or of the county clerk, shall be received in all courts as legal *evidence* of such reincorporation.[6] - - - - By the statute of *Pennsylvania*, whenever the rolling stock, property and franchises of any railway, gas company, or any corporation created by or under any law of the State shall be sold, under a decree of a court of the State or of a court of the United States, the purchasers may incorporate with all the franchises of the preceding corporation, but subject to all the restrictions imposed upon it. They must meet within thirty days of the sale, of which meeting a prescribed notice must be given. They must there organize, elect a president and six directors, adopt a name and seal, fix the amount of their capital stock, not exceeding that of the precedent corporation, in shares of $50 each, and

[1] *Ibid.*, § 1.
[2] *Ibid.*, § 2.
[3] *Ibid.*, § 3.
[4] *Post*, § 327.
[5] Rev. Stat. N. Y., *supra*, § 4.
[6] *Ibid.*, § 5.

may issue stocks and bonds, and execute mortgages on all or any part of their property. They must, within a month of the purchase, make a certificate specifying the date, name, corporate stock, name of president and directors of the new corporation, and send it to the Secretary of State for record; and a certified copy of it shall be evidence of the incorporation of the new company. They must also signify their acceptance of the provisions of article 16 of the constitution of Pennsylvania relating to private corporations. - - - - By the statute of *Kentucky*, which applies only to railroads,[1] where the property of a railway company is sold under a decree of court, the purchasers and associates may become a corporation, with the right to exercise all the franchises, privileges, etc., and subject to all the restrictions of the charter of the original company. But they may not receive subscriptions or aid from counties, towns, etc., and are subject to certain provisions of the general laws of the State relating to corporations.[2] The mode of incorporation is the same as that prescribed by the general law.[3] The new corporation may issue negotiable bonds, not in excess of the original cost or proper cost of completing the road; may give priorities and exemptions to certain stockholders; and may secure the bonds by mortgage. A lien is reserved in favor of the *wages of laborers*, for work done within three months before the sale or seizure, — that is to say, the new corporation takes the property subject to this incumbrance. - - - - By the statute of *Massachusetts*: "Any or all of the creditors of any corporation existing by authority of this commonwealth and organized or chartered for any purpose designated in this chapter, which has been adjudged bankrupt or insolvent, or has made an assignment of its property for the benefit of its creditors, or any or all persons for whose benefit such corporation has assigned the whole or any part of its property, and such other person or persons in either case as they may elect, — may associate themselves for the purpose of forming a corporation to acquire the whole or any part of the property of such bankrupt or insolvent corporation, or that have assigned for the benefit of its creditors, and to carry on the business previously authorized to be carried on by such bankrupt or insolvent corporation."[4] - - - - By the statute of *California*, the franchises, etc., of corporations may be levied upon to satisfy judgments and sold as other property. The purchaser must receive a certificate of purchase of the franchises, and immediately be let into possession, and must transact the business of

[1] Bull. & F. Ky. Stat. 1887, p. 767, § 1.

[2] Ky. Acts of 1855–6, No. 148, §§ 1 and 2.

[3] Gen. Stat. Ky., chap. 56.

[4] Gen. Stat. of Mass. 1882, ch. 106, § 15.

such corporation, with its powers, privileges and liabilities, till the franchise is redeemed. He may recover penalties for injuries to the franchise, and for this purpose may use the name of the corporation, and his recovery will be a bar to another recovery by the corporation. In all other respects the corporation retains the same powers and continues bound to discharge the same duties, and subject to the same penalties as before the sale. The corporation may *redeem* within one year, by paying or tendering the money expended by the purchaser with ten per cent. interest, but without any profits, he retaining the tolls and profits. The sale must be made in the county where the corporation has its principle place of business, or where it has taxable property.[1] - - - - By the statute of *Michigan:* "Whenever any corporations, now existing or hereafter formed, may have conveyed all their corporate property, real and personal, together with their franchises, growing out of or pertaining thereto, or together with all their corporate franchises, by way of mortgage or deed of trust, in case of the sale of the same thereunder, the purchasers at such sale and their associates shall be entitled to have and exercise all the privileges and franchises held by such corporation, and shall be deemed and taken to be the true owners of its corporate rights, and to be corporators vested with all the rights, powers, privileges, and benefits conferred by law or the statutes of this State upon such corporations, in the same manner, and to the same extent, as if they were the original corporators at the formation of such corporations; and they shall, within thirty days after such sale shall become absolute, file articles of association, together with a copy of the order confirming the sale, in the office of the Secretary of State, and in such other office or offices as the original articles of association or corporation were required to be filed in, and they shall hold title to and enjoy all property acquired by, or donated to, such corporation, which may have been purchased by them at such sale; and such (successor) corporation may issue, and themselves hold new stock in said corporation to such an amount and of such denomination as was prescribed in the articles of association or charter of the original corporation. After filing the new articles of association, as required by this act, the old officers of said corporation shall be superseded, and the old stock in said corporation shall be deemed forfeited and extinguished, and may be canceled on the books of said corporation; and the new stockholders, and the officers by them chosen, or elected, shall, in the law, be deemed and taken to be the stockholders and officers of said corporation, and the said corporation shall not be liable for any debts or obligations, except those by it thereafter contracted. But no prior mort-

[1] Deer. Ann. Codes Cal. 1885, § 388.

gage or lien shall be in any way affected by such proceedings, and all property whatsoever, if any, that shall not be sold, shall remain liable for all debts of such original corporation, and no liability of any corporators, director, or other persons whatsoever shall be in any way lessened or affected by any proceeding or act authorized by this act. *Provided*, that in making such sale, the property essential to the exercise of corporate rights, together with the corporate franchises, shall be deemed an entire thing, and shall be sold as such, separate from any other property mortgaged."[1] - - - - Such a statute was enacted in *Alabama* as follows: "In each and every case in which any railroad may hereafter be sold by the State of Alabama, or by any commission, officer, or agent of said State, or by any proceeding, judicial or otherwise, authorized by law, the purchasers at any such sale may constitute themselves into a body politic and corporate, and shall have and possess all the powers and franchises which belonged to the company or corporation originally owning the railroad so purchased, including the power to purchase and hold real estate, and the franchise to be and exist as a corporation under such name as the purchasers may select and adopt. And the board of directors of such new corporation shall have power . . . to lease, sell, or mortgage all or any part of the franchises or property of such corporation, including the franchise to be and exist as a corporation." An amendment enacted in 1875[2] defines the meaning of the word *purchasers* in the preceding statute, and provides that a majority in interest of the purchasers may organize the corporation, for the benefit of themselves and all others interested, and contains further modifications not important to be stated. The effect of this statute was to make the reorganized corporation a *new corporation* as to the ownership of property, and in the sense of not being liable for the debts and engagements of the former company; but in respect of its franchises it was but a *continuation* of the former company. "These," said the court, "the new corporation succeeds to, precisely as they were surrendered or lost by the defunct corporation." When, therefore, the defunct corporation held its franchises subject to a law of the State imposing a certain limitation as to the amount of *tolls* which it could exact, the new corporation received its franchises subject to the same limitation.[3]

§ 260. These Schemes of Reorganization favored. — Schemes among stockholders and bondholders, formed to buy

[1] Mich. Ann. Stat. 1882, § 4885.

[2] Alabama Act of March 20, 1875; Alabama Laws of 1875, p. 132.

[3] Mobile &c. R. Co. *v.* Steiner, 61 Ala. 559.

and reorganize corporate properties, such as railroads, are favored by the courts, unless they assume the form of schemes and combinations prejudicial to the rights of the creditors. In other words, they are favored when they are equitable.[1] But members of the old company can no more be *forced* into a reorganization against their will than they could be forced to join a new company in the first instance.[2] When therefore the charter of a corporation expires, a majority of the stockholders, proposing to form a new company, have no right, as against a minority, to make an arbitrary estimate of the property of the corporation to be transferred to the new company, and require the minority to go into the new company or receive for their interest in the property of the old company a sum fixed by those who are buying them out.[3]

§ 261. Effect of Reorganization after Mortgage Foreclosure. — The valid foreclosure of a mortgage upon all the property and franchises of a corporation, *cuts off* absolutely the *rights* of the *stockholders*. Thereafter they can have no rights in the reorganized corporation, except such as are secured to them, if any, by the decree of foreclosure, or by voluntary arrangements among the parties in interest.[4] Where the foreclosure takes place under an *arrangement* between the holders of bonds secured by mortgage and the stockholders in the corporation, whereby the latter are to be allowed to come into the reorganized company, upon certain conditions, such a stockholder cannot come into the company without *tendering compliance* with those conditions.[5] It is a mere matter of contract, and he cannot have the benefit of it without performance of the obligation assumed on his own part. Where the purchasers of the property of a railroad corporation under the statutes of New York[6] at a foreclosure sale reorganize the corporation, they thereby form

[1] Robinson *v.* Phila. &c. R. Co., 28 Fed. Rep. 340. See Riker *v.* Alsop, 27 Fed. Rep. 251, construing the terms of such an arrangement.

[2] *Ante*, § 52.

[3] Mason *v.* Pewabic Min. Co., 133 U. S. 50; *s. c.* 33 L. ed. 524; 10 Sup. Ct. Rep. 224; *post*, §§ 316, 343, *et seq.*

[4] Thornton *v.* Wabash R. Co., 81 N. Y. 462; Vatable *v.* New York &c. R. Co., 96 N. Y. 49, 56.

[5] Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75.

[6] *Ante*, §§ 258, 259.

a *new and entirely distinct corporation* from the old company. The right to be a corporation not being the subject of mortgage, did not pass by the sale, but is obtained by a direct grant from the State on filing the new certificate of incorporation.[1] As this proceeding is the organization of a new corporation, the adventurers must pay to the treasurer of the State of New York the percentage upon their capital stock provided by another statute of the State; and the statute which obliges them to pay this, in this operation of it, is in no wise an impairment of the obligation of their contract as mortgagees of the old corporation.[2]

§ **262. Special Privileges of Antecedent Companies pass to New.**— Where the statute empowers a railroad company to mortgage all its property and franchises to secure an indebtedness, and the property and franchises are sold under the mortgage, and a new company is organized under the general laws of the State, there is doubtful authority for the conclusion that special privileges accruing to the old company under its charter vest in the new, so that the new company will not, in respect of its obligation to *fence its track* and its liability to damages for failure so to do, be subject to the general law, but will be subject to the special charter provisions of the old company.[3] It was said that "the object of the legislature was manifestly to keep alive the rights and duties of the old company and to transfer them to the new company, the purchaser. That the franchise was not intended to be resumed by the State, is clear. The intent of the legislature must have been . . . 'that such property was to be holden in the same manner, and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any right thereby.'"[4] In like manner, it was said by the Supreme Court of Ohio: "It must be inferred that the legislature intended the purchasing company to succeed to the powers and privileges of the vending company, and to none other. The in-

[1] People *v.* Cook, 110 N. Y. 443.

[2] People *v.* Cook, 110 N. Y. 443.

[3] Daniels *v.* St. Louis &c. R. Co., 62 Mo. 43.

[4] *Ibid.*, p. 47; quoting from Tomlinson *v.* Branch, 15 Wall. (U. S.) 465, which was not a case of *reorganization,* but of *consolidation.* *Post,* § 365, *et seq.*

trinsic, as well as the market value, of such property as a railroad largely depends upon the *rates* which may be charged for transportation thereon. If the chartered rates follow the property, the contracting parties stand on perfect equality; but if the value, or in other words, the inducement to contract, depend on the chartered privileges of the purchaser, the equality is not preserved, and especially would different companies, with different charters, occupy unequal grounds as bidders for the purchase of such property."[1] In every such case, the solution of the question must be sought in the intent of the governing statute and applicatory constitutional provisions.[2]

§ 263. New Corporation when not Liable for Debts of Old.— To render the successor of a corporation liable for the indebtedness of the antecedent one, something more must be shown than the mere fact that the new corporation succeeded to the business of the former. The party seeking to recover of the new corporation for a debt of the old must prove, at least, that the new received some portion of its funds or property which was chargeable with his debt.[3] Where a new company is established in the place of an old one whose property it has *purchased*, neither this property, except so far as it is subject to prior liens, nor the future earnings of the new company, can be taken to pay the debts of the old.[4] Where a *mortgage* of the

[1] Campbell *v.* Marietta &c. R. Co., 23 Oh. St. 188. In Sly *v.* Penn. R. Co., 65 Pa. St. 209, the question is discussed in relation to the successorship of corporate rights as between *lessor* and *lessee;* and the court concludes that "the lessee of a railroad corporation must necessarily be bound by all the prohibitions and limitations contained in the charter of the lessor; and, on the other hand, must be held to be entitled to all their rights and franchises. The legislature, by authorizing another corporation to take such lease, have, by necessary implication, conferred them."

[2] A statute providing that "all rights" as to a line of railway which "are and have been legally vested" in one corporation shall pass to another corporation upon a sale by one to the other, *passes* a right of exemption from taxation, where such right exists in the vendor company at the time of sale. Atlantic &c. R. Co. *v.* Allen, 15 Fla. 637. In Arkansas a legislative *privilege* granted to a railroad corporation, that the *fares* shall not be reduced below a certain limit, *does not pass* to a corporation organized after a foreclosure sale of the property and franchises of the original company. Dow *v.* Beidleman, 49 Ark. 325; *s. c.* S. W. Rep. 297.

[3] Hopper *v.* Moore, 42 Iowa, 563; *post*, § 375.

[4] Bruffett *v.* Great Western R. Co., 25 Ill. 353.

assets of a corporation — generally a railway company — is *foreclosed* and the purchasers, for the purpose of managing the property and taking to themselves the necessary corporate franchises, organize a new corporation, this, not being a continuation of the old corporation, is not liable for its debts,[1] or bound to perform its obligations although the new company takes the same name as the old one, unless such a liability has been assumed by contract, or has been imposed by an operative statute. This conclusion is obvious on the slightest reflection. It would entirely defeat and destroy the value of a mortgage security upon corporate property, if the mortgagees, obliged to become the purchasers of the property at a foreclosure sale, could organize themselves into a corporation for the purpose of managing it only upon the condition of assuming the floating debts of the old company. The result would simply be to oblige the secured creditors to pay the debts due to the unsecured creditors. Or, as Mr. Justice Cooper quaintly remarked, it "would be a practical illustration of the query, 'does prohibition prohibit,' in the form of 'does security secure?'"[2] Thus, a railway company, organized under the provisions of a general law, with power to purchase the franchises and property of an older company, previously sold under a mortgage, as well as to construct and operate other lines of road, is not, by virtue of such purchase, an assignee of the older company, so as to be bound by its contracts, except such as are a lien or charge upon the property and franchises thus purchased.[3] A statute of Wisconsin[4] authorizing any person or corporation becoming the pur-

[1] Memphis Water Co. *v.* Magens, 79 Tenn. 37.

[2] *Ibid.*, p. 44; Menasha *v.* Milwaukee &c. R. Co., 52 Wis. 415; Thornton *v.* Wabash R. Co., 81 N. Y. 462; Neff *v.* Wolf River Boom Co., 50 Wis. 585; Sappington *v.* Little Rock &c. R. Co., 37 Ark. 23; Gilman *v.* Sheboygan &c. R. Co., 37 Wis. 317; Vilas *v.* Milwaukee &c. R. Co., 17 Wis. 498; Smith *v.* Chicago &c. R. Co., 18 Wis. 17; Wright *v.* Milwaukee &c. R. Co., 25 Wis. 46; Cook *v.* Detroit &c. R. Co., 43 Mich. 349; Sullivan *v.* Portland &c. R. Co., 94 U. S. 806, 810; Child *v.* New York &c. R. Co., 129 Mass. 170; Stewart's Appeal, 72 Pa. St. 291; Hatcher *v.* Toledo &c. R. Co., 62 Ill. 477; Hoard *v.* Chesapeake &c. R. Co., 123 U. S. 222; *s. c.* 31 Law. ed. 130; 8 Sup. Ct. Rep. 74; Helton *v.* St. Louis &c. R. Co., 25 Mo. App. 322; Houston &c. R. Co. *v.* Shirley, 54 Tex. 125, 137. See also Morgan County *v.* Thomas, 76 Il. 147.

[3] Menasha *v.* Milwaukee &c. R. Co., 52 Wis. 414.

[4] R. S. Wis., p. 521, §§ 1788, 1789.

chaser of the property and franchises of any corporation at mortgage, bankrupt or other judicial sale, to "reorganize under the charter or act of incorporation or law under which such company or association was created or organized," and to "have the same rights, powers, privileges and franchises such company, association or corporation had or were entitled to at the time of such purchase or sale," — does not make the reorganized corporation a continuance of the old one and liable for its debts.[1] But where the old railway company had appropriated land of the plaintiff without paying him for it, and the new company continued the operation, it was held that, although the land-owner could not maintain against the new company an action of debt on a judgment recovered against the old for the taking, yet he might have a remedy in equity against the new company to compel it either to pay compensation for the use of his land, or to stop rnnning its cars over it. But this liability would be founded upon the principle that the new company had seen fit to adopt and ratify the original undertaking, and had therefore made itself liable to make compensation. It would be an application of the maxim *qui sentit commodum sentire debet et onus.*[2] The same principle applies in respect of the rights of one who acquired a lien upon the property of the old company subsequently to the making of the mortgage. This lien does not, of course, follow the property into the hands of the company which is reorganized after the mortgage foreclosure; since the contract is one which does not affect the prior mortgagees, and to allow it to operate as a lien upon the property in their hands would be to allow the mortgagor, by a subsequent contract with a stranger, to impair the security of his mortgagee.[3]

§ **264. Illustrations.** — A banking company existed in Texas, under a charter of such a nature that the legislature, in the event of its expiration, had not, under the constitution, the power of renewing it. It became insolvent, and made an arrangement with all its creditors,

[1] Neff *v.* Wolf Riv. Boom Co., 50 Wis. 585.

[2] Gilman *v.* Sheboygan &c. R. Co., 37 Wis. 317.

[3] Child *v.* New York &c. R. Co., 129 Mass. 170.

save one, by which they agreed to accept 74 cents in the dollar of their respective claims. Thereafter certain citizens subscribed about $20,000, to be added to the assets of the insolvent bank; a new banking corporation was organized in a manner not shown by the evidence; but it took the same name as the old corporation, and the old corporation transferred all of its assets to it, and undertook to include in the transfer its name and corporate franchises. It also obligated itself to pay to the new corporation whatever amounts the latter might be compelled to pay, in excess of the 74 cents in the dollar which all the creditors save one had agreed to receive in compromise of their respective claims; and the new corporation agreed to pay for the old corporation this 74 per cent. A dissenting creditor brought an action against the new corporation to recover the balance due him as a depositor, on the theory that it was the same corporation as was the old. The court held that this theory was correct. "The shareholders at that time agreed with a new set of shareholders that the latter should become substituted to the rights of the former in the corporate property and franchises, in consideration of their agreeing to pay its creditors to the extent of 74 cents on the dollar. This is shown by the facts that the business was resumed in the original name of the corporation, and that the original seal was used in the authentication of its transactions. The use of the seal conclusively establishes that the operations of the concern were carried on under the franchises of the original charter and its amendments; for, since the adoption of the present constitution, no new charter could have been obtained for the purpose of doing a banking business. It is uniformly held that a corporation is not dissolved by the mere fact that it becomes insolvent." After citing cases in illustration of this principle, the court proceed: "There being a mere change of membership, and not a change of the corporation itself, it follows that the obligations existing against it before the original organization, continued to exist against it when reorganized."[1] - - - - An agricultural society, whose object, according to its constitution, was "to improve the condition of agriculture, horticulture, and the mechanic and household arts," was reorganized into a joint stock company, "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts," the name being changed only by substituting the word "board" for "society." The old society provided for holding annual fairs, and the new for annual fairs and exhibitions. It was held, that there was no substantial change in the objects of the society; and the new one, continuing still a public institution, was liable only to the extent of its corporate

[1] Savings Bank v. Sachtleben, 67 Tex. 421, 424.

property.[1] - - - - Where an act of assembly placed the coming into existence of a railroad company upon the contingency of the sale of a certain railroad under a mortgage and purchase thereby and allowed the stockholders in the original company, by an arrangement subsequent to the purchase and before the organization of the new company, to become stockholders of the new company, without payment of any money, — it was held that this did not impose on the new company the debt of the old.[2]

§ **265. But Assets of Old Corporation Liable for its Debts in Hands of New.**— As elsewhere shown,[3] the assets of a corporation are a *trust fund* in its hands, for its creditors. From this it follows that any arrangement which involves an unauthorized diversion of this trust fund, from an *insolvent* to a reorganized corporation, will not affect the rights of dissenting creditors, so as to disable them from following the fund into the hands of the new corporation and subjecting it to the payment of their debts.[4] Where the corporation is reorganized in such a sense as to create a new corporation, instead of merely reviving and continuing the old one, — although the new corporation will not be liable at law for the debts of the old one, yet the assets of the old corporation may be pursued in equity, as a trust fund, into the hands of the new corporation, and there subjected to the debts of the old corporation.[5] So, a conveyance of its assets by one corporation to another, for the purpose of hindering, delaying or defrauding its creditors, stands on the same footing as a *fraudulent conveyance* by a private person, and is voidable at the suit of a judgment creditor, or otherwise according to the rules of procedure of the particular forum. A transfer of all the assets of one corporation to another, whereby, through a mere change of name, an attempt is made to defraud creditors, or which would

[1] Livingston County Agricultural Society *v.* Hunter, 110 Ill. 155.

[2] Stewart's Appeal, 72 Pa. St. 291. That an assumption by the new company of the debts of the old, does not oblige it to issue its *shares* to the shareholders of the old, in exchange for theirs, see Conant *v.* National Ice Co., 40 N. Y. Super. 83.

[3] *Post*, § 2951.

[4] Railroad Co. *v.* Howard, 7 Wall. (U. S.) 392; recognized in Vose *v.* Cowdrey, 49 N. Y. 343.

[5] Marshall *v.* Western &c. R. Co., 92 N. C. 322; Von Glahn *v.* De Rosset, 81 N. C. 467; Railroad Co. *v.* Rollins, 82 N. C. 523; Dobson *v.* Simonton, 86 N. C. 492; Agricultural Society *v.* Hunter, 110 Ill. 155.

operate as a fraud upon them, will not be upheld as against them, and the transferee, taking the property with notice, takes it *cum onere*.[1] Thus, it has been held that if the shareholders in a corporation enter into a scheme by which they purport to form a new corporation and elect the officers of the old as officers of the new, and divide the stock of the new among those who were stockholders in the old, in proportion to their respective holdings in the old and in exchange for the same, and the trustees of the old corporation then cause its property to be conveyed to the new, — this conveyance will be held fraudulent as to creditors of the old corporation.[2] In such a case, on principle, the right of a creditor of the old corporation to pursue its property in the hands of the new would seem to rest equally on either of the three following grounds: 1. That of a fraudulent conveyance, as stated in the case just cited. 2. That the property is a trust fund for the payment of his debts, and that he can follow it in equity into the hands of any new taker with notice and charge him as a trustee. 3. That the new corporation is in fact merely a continuation of the old, and in law the same person as the old. In some jurisdictions the *equitable interest* of the old corporation in its assets, which have passed into the hands of the new, may be *levied upon* under an *attachment* or *execution* at the suit of a creditor of the old.[3]

§ 266. Illustrations. — A good illustration of the doctrine of the preceding paragraph is found in a case where the stockholders of an insolvent corporation contracted to sell all its property to another corporation, under an arrangement with the mortgagees of the former, whereby such mortgagees consented to receive 84 per cent. of the purchase money, in satisfaction of their claims, to a much larger amount,

[1] Blair *v.* St. Louis &c. R. Co., 22 Fed. Rep. 36.

[2] San Francisco &c. R. Co. *v.* Bee, 48 Cal. 398. The transfer of the property of a corporation to a new company, the stockholders of which consist of the old stockholders and *certain* creditors of the old company, is fraudulent as to *other* creditors. Montgomery Web. Co. *v.* Dienelt, 133 Pa. St. 585; *s. c.* 19 Atl. 428. An insolvent corporation cannot transfer its property, even for a *valuable consideration*, to a new corporation into which it is reorganized, so as to hinder or delay its creditors in the collection of their debts, although such hindrance or delay was not the purpose of the transfer. McVicker *v.* American Opera Co., 40 Fed. Rep. 861.

[3] Such is the law of Georgia. Georgia Ice Co. *v.* Porter, 70 Ga. 637.

and whereby the residue (16 per cent.) was to be paid to the stockholders, which arrangement left certain judgment creditors unpaid. It was held that this residue of 16 per cent. represented the equity of redemption in the mortgaged property, and belonged to the insolvent corporation, and not to its stockholders; that the corporation was entitled, as trustee for its creditors, to the benefit of the rebate made by the mortgagee; and that the judgment creditors were entitled to have it applied to their demands in preference to the stockholders, to whom, by the terms of the contract, it was payable; and further, that it made no difference that the title to the property was transferred to the purchaser by means of a foreclosure of the mortgage thereon, — such foreclosure having been made in pursuance of the arrangement, and merely as a means of consummating the contract of sale and transferring a clear title.[1] - - - - On the other hand, the application of this principle was denied in a case presenting the following state of facts: Certain creditors of an insolvent railroad company entered into an agreement to purchase the property of the company upon a foreclosure sale and to organize a new company. The agreement provided for the issuing of bonds and stock by the new company, apportioning the same among the holders of the mortgage bonds, actually issued, of the old company, and certain other specified creditors. The property was purchased for less than the aggregate amount of such mortgage bonds, and was afterwards transferred to the new company, its bonds and stocks issued, and apportioned as provided in the agreement. The old company being indebted to H., one of the parties to the creditors' agreement, for iron rails furnished by him, and A., being equitably entitled, under the contract of purchase, to its mortgage bonds, for the unpaid balance on the rails, he brought suit claiming that, his claim not being included in the first mentioned agreement, the bonds to which he was equitably entitled should be deemed to have been actually issued to him, at the date of making the creditor's agreement, and that the property in the hands of the new company be deemed held by it in trust to provide for plaintiff's mortgage bonds, as for those which had actually been issued and provided for in such agreement. The complaint alleged no fraud, either in the creditors' agreement or the foreclosure sale, or that any of the stockholders in the old company derived benefit from the creditor's agreement. The defendants demurred. It was held: 1. That the parties to the creditors' agreement were *bona fide* purchasers, and acquired the property unincumbered by any trust, except such as was expressed in the agreement itself. 2. That although, as between the old company and its creditors, equity would deem that

[1] Railroad Co. *v.* Howard, 7 Wall. (U. S.) 392.

to have been done which ought to have been done, this rule would not apply to the rights of third parties (as between each other), who had contracted, with reference to acts of the company already performed, and that the plaintiff, having himself been a party to that contract and received benefit from it, could not bring it within the rule. 3. That therefore the facts stated in the complaint did not constitute a cause of action.[1] - - - - The Supreme Court of Georgia has said that "the conversion of a trading company, acting as a corporation *de facto*, into one *de jure*, will not exempt the property held in the latter character from liability for the obligations of the former."[2]

§ 267. **When New Corporation Liable for Debts of Old.** — While, as a general rule, the corporation which succeeds, by a purchase under a foreclosure sale, to the property of another corporation, is not liable for its general debts, it may become so by organizing under a *statute* which imposes this liability upon it. Such was the case where the Terre Haute, Alton & St. Louis Railroad was sold under a judgment, and its purchasers were, by an act of the legislature of Illinois, incorporated under the name of the St. Louis, Alton and Terre Haute Railroad Company, with the following proviso in their charter: "All *bona fide* claims or judgments for stock heretofore killed by the Terre Haute, Alton & St. Louis Railroad, and all claims for right of way on that part of the road from Belleville to Illinoistown, and all just dues for work and labor done, and for wood and ties furnished or taken for the said Terre Haute, Alton and St. Louis Railroad Company, shall be assumed and paid by the St. Louis, Alton and Terre Haute Railroad Company, as a condition precedent to the operation of this act."[3] It was said of this statute: "It was manifestly the intention of the legislature, in thus clothing appellants with the property and franchises of the old company, to place them as a corporation in their shoes, on certain conditions, one of which was that they should pay and discharge all unsatisfied judgments recovered against the old company for work and labor performed for it on their railroad. The name of the old company may remain, but that is all. It is stripped of all its powers and

[1] Vose *v.* Cowdrey, 49 N. Y. 336.

[2] Georgia Ice Co. *v.* Porter, 70 Ga. 637, 642.

[3] Ill. Priv. Acts of 1861, p. 530.

franchises and property, to all of which appellants have succeeded, and they have assumed, in consideration of the grant, to become the debtors of such creditors of the old company as had obtained judgments against it for work and labor done upon their road, the benefits of which appellants are in the full and undisturbed enjoyment." It was not a good argument, in an action brought against the new company on a liability of the old, that the statute had given, in express terms, no action, for the common law would supply the *remedy;* nor was it an available argument that the new corporation was not a *party* to the judgment against the old; nor that no *notice* had been given to the new company of the existence of the judgment, since the statute required no notice.[1] So, of course there might be a valid *agreement*, between the corporation, the trustees in the mortgage and the bondholders that, after a sale under the mortgage, the company should be so reorganized that the stockholders and unsecured creditors of the old company should become stockholders in the new. Such an agreement would modify to that extent the ordinary effect of a mortgage sale.[2] It seems that no enabling act is necessary in order to the validity of such an agreement, since it is nothing more than a concession by the mortgage creditors to the unsecured creditors and stockholders, who are merely creditors of an inferior class.

§ **268. Organization of New Company does not Necessarily Destroy Old.** — The organization of a new corporation upon the ruins, so to speak, of the old, does not necessarily have the effect of destroying the legal existence of the old, so as to prevent actions being prosecuted against it.[3] An illustration of this is frequently seen in the case where a mortgage covering all the property and franchises of a railway company has been foreclosed, and a new corporation has been organized by the purchasers at the foreclosure sale to own and operate the property. In such a case the original company continues, for the purposes of legal remedies, until regularly dissolved. A case in New

[1] St. Louis &c. R. Co. *v.* Miller, 43 Ill. 199.

[2] See Smith *v.* Chicago &c. R. Co., 18 Wis. 17.

[3] See for illustration of this, Cary *v.* Schoharie Valley &c. Co., 4 Thomp. & C. (N. Y.) 285; *ante*, § 256.

Jersey presents an anomalous state of facts, where there was a partial *consolidation* between two corporations, and then a *subsequent reorganization* of one of them, under a new legislative act authorizing it to increase its stock. On the state of facts presented, it was held that the company which, under the arrangement, was to absorb the other by receiving all its stock and property, real and personal, would be protected in equity in the possession of what it had received. It was also held that the reorganized company which, under the statute authorizing its reorganization, had taken a new name was a new company in respect of the property owned by the predecessor company, had no title either legal or equitable to the property which such company had agreed to convey to the absorbing company. For the purposes of the case, the court fell back upon the other proposition, that if it were mistaken in this, and if the new company were not a new corporation, but was merely the old company under a new name, then the increased stock authorized by the legislature, as well as the old stock, belonged in equity to the absorbing company.[1]

§ 269. Stockholders Bound to take Notice of Plan of Reorganization, and to Signify their Assent within the Prescribed Time. — Where a scheme of reorganization is drawn up under the provisions of a statute, the stockholders are not entitled to special notice of it, unless the statute so provides; since it would be impracticable to convey notice to the many scattered stockholders of a railway company, living in different countries and continually changing by the transfer of shares. On the other hand, they are bound to take notice of it, and may fairly be presumed to take notice of a judicial proceeding affecting their interests, of so public a character as the foreclosure of a mortgage upon the property and franchises of a railway corporation, whose stockholders they are. Where a reasonable time has been allowed then, *e.g.*, six months, to come in and assent to the scheme and comply with its terms, if they do not come in within that time they will be barred and can have no relief in a court of equity.[2]

[1] New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

[2] Vatable *v.* New York &c. R. Co., 96 N. Y. 49; reversing *s. c.* 11 Abb. N. C. (N. Y.) 133.

§ 270. Members of Stockholders' Committee cannot Purchase at Sale. — It is an established principle in equity that an agent or trustee shall not be both the seller and buyer of the same property.[1] Where, in the event of the insolvency of the corporation, the *stockholders* meet and arrange to sell the property for the purpose of liquidation, and a sale takes place, and some of the committee of stockholders, appointed to attend to the matter, turn out to be interested in the purchase, the sale will be set aside on application to a court and the showing of these facts, at the pleasure of the other beneficiaries, although the price may have been adequate, and although the purchaser may have acquired no advantage.[2] On the same principle, where a corporation, formed for manufacturing purposes, of which A. was a member, voted to sell its property, consisting of real estate and machinery, and such property was purchased by A., not for himself, but for such members of the corporation as should, within a short time, pay their proportion of the debts of the corporation and of the purchase money; and a large majority of such members, formed a new association, assumed the debts of the old company and paid the purchase-money, — it was held, in a case in equity that, as a majority of the members of the corporation, acting as agents for all, were in fact both buyers and sellers, the sale was void.[3] But in such a case a stockholder, who has the right to maintain a suit in equity to set aside such a sale, will lose his rights by failing to *disaffirm* the transaction, or to move for relief for an *unreasonable length of time*, especially where, by his delay, he has avoided a risk which otherwise he must have shared with the adverse party.[5]

§ 271. But Creditors may Combine to Purchase and Reorganize. — Where a default has occurred in the interest secured by a railway mortgage, the *creditors* of the corporation may, without any imputation of fraud, combine for the purpose of protecting themselves, by purchasing the property when legally brought to sale to foreclose the mortgage, — provided, it is no

[1] Banks *v.* Judah, 8 Conn. 145.

[2] Reilly *v.* Oglebay, 25 W. Va. 36.

[3] Banks *v.* Judah, 8 Conn. 145.

[4] *Ibid.*

part of the agreement to prevent competition at the sale, or to acquire any unfair advantage over others.[1]

§ 272. When Minority of Shareholders not Bound by Reorganization by Majority.—On principles which have already been fully discussed,[2] where the governing statute provides that, when the corporation expires by limitation, it shall remain a corporation simply for the purpose of having its affairs wound up,—a majority of the *shareholders* cannot, by a reorganization bind the minority, so as to continue their property in the new corporate venture. The minority are therefore not bound by a scheme of reorganization concocted by the majority, whereby the corporate property is to be transferred to the new corporation at a certain valuation, unless at an attempted cash sale at auction, no more can be procured.[3] In such a case the minority will be entitled to an injunction to prevent the intended sale, and to a decree directing the sale of the property for cash to the highest bidder, the proceeds of the sale to be applied to the payment of the corporate debts and thereafter to the shareholders upon a *pro rata* distribution,—with the proviso that, if no bid exceeds the valuation fixed by the directors, the arrangement sanctioned by the majority may be carried out, and the property conveyed to the new company.[4]

§ 273. When Minority of Bondholders Bound by Reorganization by Majority.—A recent case in Connecticut runs contrary to this view so far as concerns the rights of the *bondholders*, on grounds which have been exceedingly well summed up in the reporter's syllabus, as follows: "Where a railroad company is chartered with power to take private property and to construct

[1] Kitchen *v.* St. Louis &c. R. Co., 69 Mo. 224; Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576 (in which case it was held that there was nothing in the agreement illegal or fraudulent as to the complainant, a judgment creditor of the old company). See also Sage *v.* Central R. Co., 99 U. S. 334.

[2] *Ante*, § 71, *et seq.*

[3] Mason *v.* Pewabic Mining Co., 25 Fed. Rep. 882. Circumstances under which a bill in equity, by a dissenting stockholder to prevent the reorganization and consolidation of the company, was rejected: Mills *v.* Hurd, 29 Fed. Rep. 410.

[4] *Ibid.* The annexing of this proviso seem to be a large stretch of equitable discretion.

and operate its road, the authority given is in the first instance permissive merely, and no obligation rests upon the company to exercise the powers granted. But where the company has taken private property and constructed its road, it has come under an obligation to carry into effect the objects of its charter, and its capital stock, franchises and property stand charged primarily with this public trust. Where such a company is empowered to issue bonds and to secure them by a mortgage of its franchise and all its property, the mortgagees take the mortgage subject to this trust. Where such a company fails and the mortgage has to be foreclosed, the legislature has full power to authorize the bondholders, by a vote of a majority, and with an equal opportunity to all, to reorganize as a new corporation, with the rights of the old corporation, such authorized action being merely a mode of securing the performance of the paramount public trust; and a dissenting minority have no private rights that can be successfully asserted against such action."[1] This is in accordance with views which have been expressed by Mr. Chief Justice Waite, of the Supreme Court of the United States: "To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretense even of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which the bondholders secured by a railroad mortgage, bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the views of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust."[2] A stricter view is that the scheme of reorganization can only be made effective by the consent of all the original bondholders, enforced by a foreclosure cutting off their lien; that a bond-

[1] Gates *v.* Boston &c. R. Co., 53 Conn. 333.

[2] Shaw *v.* Railroad Co., 100 U. S. 605, 612.

holder has a right to stand upon his contract, and that the trustees have no power to compel him to make a new and different one. It is a part of this conclusion that the trustees and a majority of the bondholders have no right to enter into a scheme of reorganization, against the dissent of a minority, which shall involve a waiver of default in the payment of principal and interest on the bonds. Each bondholder has a right to what his contract gives him, and judicial power does not extend to setting it aside at the will of a majority of those standing in the same relation with him, however great.[1] Under this view the majority of the bondholders will be obliged either to see that the mortgage is foreclosed according to its terms, or else to purchase the interests of the dissenting minority.

§ **274. Reorganization under British and Canadian Arrangement Acts.** — In Great Britain and in the Dominion of Canada, where the power of the parliament is supreme, — that is to say, unhampered by any constitutional prohibition against the passing of laws impairing the obligation of contracts, or against depriving persons of life, liberty or property without due process of law, — it is competent for the parliament to enact a law providing for a composition or arrangement among the parties interested in the assets of an insolvent corporation, although the effect of such law may be to compel a minority to surrender their rights at the will of the majority, — which, as already seen, it is not competent for the legislatures of the American States to do.[2] "Hitherto," said Lord Cairns, L. J., in discussing such an act, "such companies, if they desired to raise further capital to meet their engagements, have been forced to go to parliament for a special act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained. And parliament, in dealing with such applications, has been in the habit of considering how far the arrangements proposed as to such new capital were assented to or dissented from by those who might be considered as the proprietors of the existing capital of the company, either as share-

[1] Hollister *v.* Stewart, 111 N. Y. 644; distinguishing Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527; denying Ketchum *v.* Duncan, 96 U. S. 659.

[2] *Ante,* § 66 *et seq.*

holders or bondholders. The object of the present act . . . appears to be to dispense with a special application to parliament of the kind I have described, and to give a parliamentary sanction to a scheme filed in a court of chancery, and confirmed by the court, and assented to by certain majorities of shareholders and holders of debentures and securities *ejusdem generis*."[1] It is said that the practice still prevails in England of passing special "arrangement acts," whenever the provisions of the general act above referred to by Lord Cairns are not such as are needed to meet the wants of a particular company.[2] In Canada, as late as 1883, there was no general statute on this subject like that in England, but the practice of passing special acts prevailed; and it was said in one case in Canada: "Our statute books are full" of legislation of this kind.[3] The authority of parliament to pass such laws seems never to have been doubted, either in England or in Canada. "Many cases are reported in which such statutes were under consideration, but in no one of them has it been intimated that the power was even questionable."[4] The Supreme Court of the United States, after an investigation of this matter, has held that the parliament of Canada has authority to grant to an embarrassed railway corporation, within that Dominion, the power to make an arrangement with its mortgage creditors for the substitution of a new security in the place of the one which they hold, and to provide that the arrangement shall be binding on all the holders of obligations secured by the same mortgage, when it shall have received the assent of the majority, — provision being made for the protection of the minority in the enjoyment of rights and privileges in the new security identical with those of the majority.[5] It was further held,[6] that such an arrangement is binding upon citizens of the United States, who are bondholders in the Canadian corporation, where it gives them the same rights to participate in the reorganization which are

[1] Re Cambrian Railways Company's Scheme, L. R. 3 Ch. 294.

[2] Waite, C. J., in Canada Southern R. Co. *v.* Gebhard, 109 U. S. 534; citing London Financial Asso. *v.* Wrexham &c. R. Co., L. R. 18 Eq. 566.

[3] Jones *v.* Canada Central R. Co., 46 Up. Can. Q. B. 250.

[4] Waite, C. J., in Canada South. R. Co. *v.* Gebhard, *supra*.

[5] Canada South. R. Co. *v.* Gebhard, 109 U. S. 527.

[6] Mr. Justice Harlan dissenting.

accorded to Canadian citizens, or other British subjects.[1] The case is an apt and forcible illustration of the principle that rights in a corporation are governed by the law of the place of the domicile of the corporation.

§ 275. Compromise Arrangement must be Substantially Complied with. — It is scarcely necessary to say that where a compromise arrangement is entered into by different classes of corporate creditors, whereby they surrender up their various securities and accept bonds under a new mortgage, unless the arrangement is substantially complied with, it will relieve any dissenting signer of the contract, and he will be entitled to stand upon his original rights.[2] On the other hand, to entitle the stockholder to the benefits of the scheme, he must comply substantially with its terms. Thus, where, by the terms of the scheme as supplemented by an act of the legislature, the stockholders were to have its benefits, provided they should *pay* ten per cent. on the amount of their stock *within a time specified*, otherwise forfeit all rights under it, — a stockholder who paid the ten per cent. after the specified time, could not maintain an action to enforce any rights under the scheme.[3] So, where it was a part of the scheme that the subscribers should *surrender* their *bonds*, with all the coupons thereon, whenever they should be required to do so, and should receive in lieu thereof the new bonds provided for by the scheme, — a bondholder, signing the agreement, who received notice to surrender his bonds, but failed to do so until after the purchase of the road at forclosure sale and the formation of the new company, could not claim any benefits under the scheme, or insist on the delivery of the new bonds, not having complied with its terms.[4]

[1] *Ibid.*

[2] Miller *v.* Rutland &c. R. Co., 49 Vt. 399; *s. c.* 94 Am. Dec. 414.

[3] Van Alstyne *v.* Houston &c. R. Co., 56 Tex. 373.

[4] Carpenter *v.* Catlin, 44 Barb. (N. Y.) 75. *Equities of particular bondholders or stockholders under arrangements for the reorganization of insolvent corporations:* Ex parte White, 2 S. C. 469. *Agreements which have been held void as against public policy.* Munson *v.* Syracuse &c. R. Co., 29 Hun (N. Y.), 76; Bliss *v.* Matteson, 45 N. Y. 22. Compare Harts *v.* Brown, 77 Ill. 226; Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587; Kitchen *v.* St. Louis &c. R. Co., 69 Mo. 224; Carter *v.* Ford Plate Glass Co., 85 Ind. 180; Jackson *v.* Ludeling, 21 Wall. (U. S.) 616.

§ **276. Bondholder may Lose his Rights by Laches.** — As already suggested, the holder of a corporate security, whether shares of stock or mortgage bonds, may lose his rights to object to a scheme of foreclosure and arrangement, by *standing by* until the rights of third parties have intervened in such a manner that the arrangement could not be broken up so as to place the parties *in statu quo*. Thus, a bondholder of a former corporation has no standing in chancery to dissolve the present organization of a railway company, for which his *agent* had voted his bonds, in excess of his authority, and to enforce a different plan, where it appears that he knew of what his agent was doing, did not dissent from it, but accepted his share of the bonds of the new organization, had offered to buy and sell them, and had brought suit for them. Such conduct was justly deemed to be a ratification of the act. It was also regarded as conduct inducing others to believe that he acquiesced in the organization, and hence such as worked an equitable *estoppel* against his disputing it.[1] After a railroad has been sold, the sale confirmed, the new corporation organized, its stock issued and passed into the hands of the public, original bondholders, secured by the mortgage which was foreclosed, will not be allowed to come into the case for the first time, be made parties to it, reopen it, and object to and impeach the decree of foreclosure and sale. They are represented in the litigation by the *trustees*, and if it is proper for them to be made parties at all, they should be made such prior to the decree of foreclosure, at least prior to the decree confirming a sale. They cannot come in at the end of a long litigation and be made parties to the suit, and be treated in the double aspect of persons who are parties to the suit, and who have all the rights of parties from the beginning and also of persons who were not parties to the suit and whose rights have not been foreclosed.[2]

§ **277. Rights of Holders of Income Bonds.** — The holder of *bonds* of a railroad and telegraph company, which are secured upon the *income* to be derived from sales of the lands of the company and from the operation of its road and line, retains,

[1] Matthews *v.* Murchison, 15 Fed. Rep. 691.

[2] Wetmore *v.* St. Paul &c R. Co., 5 Dill. (U. S.) 531, per Miller, J.

after the consolidation of the company with another, a specific *lien* upon the income derived from the property which has gone from his debtor into the hands of the new company, and he may maintain a bill in equity to enforce it after default in payment of the principal of the bonds, or of the interest according to their tenor.[1] Nor will the new company be liable for expenses incurred in operating the property between the date of the foreclosure and the organization of the new company, unless its possession of the property is affirmatively shown. The presumption in such a case will be that the purchaser at the foreclosure sale, and not the company organized to acquire and operate the property, was in possession during this interval and down to the time of filing the certificate of reorganization.[2] On the other hand, the old company is not liable for an obligation incurred in operating the road after the foreclosure sale, provided the purchaser has in point of fact taken possession.[3]

§ 278. Effect of Transforming a Partnership into a Corporation. — The effect of transforming a partnership into a corporation is such that, as soon as the life of the corporation commences, the property ceases to be partnership property; the partners cease to be partners and become shareholders; their lien on the partnership property ceases and their character as shareholders begins; so that those who claim through a shareholder cannot set up such a lien. A corporation, formed by and consisting of the members of a partnership for the purpose of conducting the partnership business by means of the partnership property, takes the latter freed from equities subsisting among the partners, all of which are settled and extinguished by the transfer of the assets from the partnership to the corporation.[4] Such a transfer does not, however, divest any equities which creditors may have in respect of the partnership assets.[5]

1 Rutten *v.* Union Pacific R. Co., 17 Fed. Rep. 480.

2 Pittsburgh &c. R. Co. *v.* Fierst, 96 Pa. St. 144.

3 Wellsborough &c. Plank Road Co. *v.* Griffin, 57 Pa. St. 417.

4 Francklyn *v.* Sprague, 121 U. S. 215. See Hoyt *v.* Sprague and Francklyn *v.* Sprague, 103 U. S. 613.

5 Francklyn *v.* Sprague, 121 U. S. 215, 229.

§ 279. Abortive Corporations Re-incorporated under a General Law.—A company, organized under a *charter* which is *void* because passed in violation of a constitutional inhibition, may save its rights, so far as such rights are conferred in a general statute relating to companies of the like kind, by reorganizing under such general law.[1] In like manner, where a company has become incorporated under one statute, but has never entered upon business in the corporate character thus assumed, it may, it has been held, without taking any steps to dissolve such incorporation, afterwards proceed to incorporate anew under a different statute, and may under the latter statute acquire a valid corporate character.[2] A statute of Minnesota declares that "any existing corporation, association or society, transacting business of life, endowment, or casualty insurance upon the co-operative or assessment plan and incorporated under the laws of this State, may re-incorporate under the provisions of this act, by filing," among other things, a prescribed declaration, executed by "a majority of its board of directors, trustees or managers." This statute has been held to be applicable to associations whose attempted incorporation under prior statutes had been unauthorized and ineffectual.[3] In line with the principle already explained in regard to the acceptance of amendments of special charters by the directors, followed by *user* by the corporation of the powers therein granted,[4] it has been held that, where a majority of the directors of an association which has attempted to incorporate under a prior statute, but failed because its objects were not authorized by such statute, proceed under a new statute to effect a re-incorporation, so to speak, or rather an originally valid incorporation, and the association thereafter acts as a corporation, — it will be *presumed*, in proceedings of *quo warranto* on the part of the State to test the question of its rightful corporate existence, that such action of the directors was authorized by the other members of the association.[5]

[1] Southern Pacific R. Co. *v.* Orton, 6 Sawy. C. C. (U. S.) 157.

[2] Hyde *v.* Doe, 4 Sawy. (U. S.) 133.

[3] State *v.* Steele, 37 Minn. 428.

[4] *Ante*, § 80.

[5] State *v.* Steele, *supra*.

CHAPTER VIII.

NAMES OF CORPORATIONS.

§ 284. Importance of the Corporate Name. — Names are necessary to the very existence of corporations. The corporate name has been said to be "the very being of the constitution; the knot of their combination, without which they could not do their corporate acts; for it is unable to plead and be impleaded, to take and give, until it hath gotten a name."[1] A case is cited below[2] where it is held that a corporate name, although acquired by the organization of a corporation under a general law, ending with a certificate of incorporation issued by the Secretary of State, is in the nature of a *franchise* and *inviolable*, although wrongfully obtained, in the sense that it is an imitation of the name of a previously existing corporation. But an examination

[1] 2 Bac. Abr. Corp. (C.); quoted in Smith *v.* Plank Road Co., 30 Ala. 650, 664.

[2] *Post*, § 296.

of old precedents makes it doubtful whether the name of a corporation can in a strict sense be regarded as a franchise, especially in view of the fact that it may be acquired by usage or reputation.[1] Where individuals are allowed to incorporate themselves under general laws, by complying with certain forms and conditions, they not unfrequently take to themselves a corporate name *at pleasure*.[2]

§ 285. **Distinction between the Names of Natural Persons and of Corporations.** — It has been said: "The name of a corporation . . . designates the corporation, in the same manner that the name of an individual designates the person. There is this difference, however, that the alteration of a letter, or transposition of a word, usually makes an entirely different name of the person, while the name of a corporation frequently consists of several descriptive words, and the transposition of them, or any interpolation, or omission, or alteration of some of them, may make no essential difference in their sense." [3]

§ 286. **Acquired by Usage and Reputation.**— Besides their true names, corporations may have and take by names of reputation.[4] Thus, evidence was held to be admissible to show that a body incorporated as "The Society for the Propagation of the Gospel in Foreign Parts," was known as "The Church of England Society;" that its real estate was sometimes designated

[1] *Post*, § 286. In an old case in Salkeld, the following language is found: "My Lord Coke says, that a corporation must have a name; but that must be understood to be either expressed in the patent, or implied in the nature of the thing; as if the King should incorporate the inhabitants of *Dale* with power to choose a mayor annually, though no name be given, yet it is a good corporation by the name of mayor and commonalty. So the City of *Norwich* is incorporated to be a mayor and sheriffs, by the charter of *Henry IV.*, and are called mayor, sheriffs, and commonalty." Anon., 1 Salk. 191.

[2] See Falconer *v.* Campbell, 2 McLean (U. S.), 195, 198; Minot *v.* Curtis, 7 Mass. 441.

[3] Newport Mechanics' Man. Co. *v.* Starbird, 10 N. H. 123, 124, per Upham, J.

[4] Medway Cotton Man. Co. *v.* Adams, 10 Mass. 360; School District *v.* Blakeslee, 13 Conn. 227; Reg. *v.* Registrar, 10 Ad. & El. (N. S.) 839; Episcopal Charitable Society *v.* Episcopal Church, 1 Pick. (Mass.) 372; Rex *v.* Morris, 1 Ld. Raym. 337; Reg. *v.* Bailiffs, 2 Ld. Raym. 1232; Dr. Ayray's Case, 11 Co. Rep. 19; Dutch West India Co. *v.* Van Moses, 1 Strange, 612, 614.

as "Church of England Lots;" and, therefore, that it was entitled to certain lots of land thus designated in partition proceedings.[1] So, the Queen's College, Oxford, had no name given to it at its foundation, but having received its foundation and several other benefactions from the Queen, it collected by reputation the name of Queen's College, by which name it could sue and be sued.[2] So, a corporation may acquire a name by *usage*;[3] and although the name of a corporation has been *changed* by an act of the legislature, if the corporation continues to conduct its business in its original name, and otherwise exclusively uses that name after the passage of the act, it may, by usage, regain such original name, and can be lawfully sued and proceeded against in bankruptcy by that name.[4]

§ 287. **Petition to Change Corporate Name.** — Statutes exist in some of the States authorizing the judicial courts, upon a petition by the corporation, for good reason shown, to change the corporate name to some other name. Similarity of the proposed name to that of an existing corporation is ground for denying a petition for change of the name of a corporation.[5] Under the New York statute[6] authorizing the court to permit a corporation to *change its name* where it appears "that there is no reasonable objection," the matter is *discretionary* with the court. Though the Court of Appeals may think the court below has been too cautious in refusing leave, for fear of a possibility of confusion, this affords no ground for reversal.[7] In Pennsylvania, the court will not *change the name* of a corporation unless good reason is shown; and it is not a sufficient reason that the new name proposed for a bank will be of assist-

[1] Society *v.* Young, 2 N. H. 310.

[2] Pits *v.* James, Hobart, 122, 124; Dr. Ayray's Case, 11 Coke, 19, 20, 21. The same point seems to have been included in the judgment of the court in the case of the Dutch West India Co. *v.* Van Moses, 1 Strange, 612, 614.

[3] Smith *v.* Plank Road Co., 30 Ala. 650.

[4] Alexander *v.* Berney, 28 N. J. Eq. 90. When a corporation receiving a new charter retains its old name: Reg. *v.* Bailiffs of Ipswich, 2 Ld. Raym. 1232, 1239.

[5] Matter of Manhattan Dispensary, 7 N. Y. St. Rep. 871; *post;* § 296.

[6] N. Y. Laws of 1870, chap. 322.

[7] Re United States Mercantile Reporting &c. Agency, 115 N. Y. 176; *s. c.* 21 Northeast. Rep. 1034; 24 N. Y. St. Rep. 548; affirming *s. c.* 22 N. Y. St. Rep. 494.

ance among a certain nationality of the population.[1] Under a recent statute of that State [2] authorizing the improvement, amendment, or alteration of the *charters* of corporations, the name of a corporation is a *part* of such charter, and may be altered on proper application to the court.[3]

§ 288. Change of Name by Corporate Action. — Where a name has been given to the corporation by charter or statute, this can not be changed by corporate action, either directly or by user, without statutory permission.[4] But many of the general laws of the States providing for the creation of corporations contain provisions by which the name of the corporation may be changed by *corporate action*. In Iowa, unless the rule has been changed since the case below cited, a change in the name of a corporation can only be effected by changing the articles of incorporation, and the best evidence of this change is the articles themselves.[5] In Illinois, the requisites of the certificate of the president of a corporation showing a change of its name were considered; and it was held that, if the certificate showed that at a special meeting of the stockholders of the company, held at its office on a day named, and called in pursuance of the statute and in strict conformity therewith, at which meeting over two-thirds of the stock of the company was duly represented, a resolution was unanimously adopted changing the name of the company to another name stated, — is sufficient under the statute of that State.[6]

§ 289. Effect of Changing Corporate Name. — In general, it may be said that a changing of the name of a corporation has

[1] Bank of North America, 2 Pa. County Court, 97.

[2] Penn. Corp. Act of 1874, as amended by Act of June 13th, 1883.

[3] Per Kirkpatrick, Att.-Gen. Re Excelsior Oil Co., 3 Pa. County Ct. 184. The Pennsylvania act of April 20, 1869, conferring on counties power to change the *names* of corporations, applies to *religious corporations*, and is not repealed by Pennsylvania act of April 29, 1874. Re First Presbyterian Church of Bloomfield, 111 Pa. St. 156.

[4] 1 Dill. Mun. Corp. (4th ed.) § 178; Reg. *v.* Registrar, 10 Ad. & El. (N. S.) 839; Sykes *v.* People, 132 Ill. 32; s. c. 23 N. E. Rep. 391. See Episcopal &c. Society *v.* Episcopal Church, 1 Pick. (Mass.) 371.

[5] Chicago &c. R. Co. *v.* Keisel, 43 Iowa, 39.

[6] Anthony *v.* International Bank, 93 Ill. 225.

no effect whatever upon the existence or identity of the corporation, or upon rights flowing to or from it; [1] though it may have the effect of introducing some additional averments in pleading in particular cases.[2] The corporation continues, as before, responsible for all the debts it had previously contracted.[3] Subscriptions to its capital stock are not invalidated,[4] but it may sue and recover upon such contracts by its new name.[5] If the change of name takes place pending a suit, it has no effect upon the rights of the plaintiff; [6] and if the suit is *by* a corporation, and, pending the suit, there is a change of name, it will be too late, after judgment, for the defendant to set up that there was no such corporation, especially if he fails to make it appear that the corporators accepted the new name.[7] When, by the terms of its charter, a corporation is to be the successor of an insolvent corporation, having the same functions, franchises, powers and privileges, and is to become bound for the payment of certain claims against the first corporation, an action of debt or *assumpsit* may be maintained against the new corporation.[8]

§ **290. The Corporate Name in Suits.** — It has been said that the corporation can sue *only* in the name and style given to it by law; [9] and it has been said that a *company* may sue and be sued by its descriptive name.[10] But it seems that a corporation

[1] Welfley *v.* Shenandoah &c. Co., 83 Va. 768; Mayor of Scarborough *v.* Butler, 3 Lev. 237; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1; Corporation of Ludlow *v.* Tyler, 7 Car. & P. 537; Attorney-General *v.* Wilson, 9 Sim. 30, 48; Attorney-General *v.* Kerr, 2 Beav. 420, 429; Attorney-General *v.* Corporation of Leicester, 9 Beav. 546; Doe *v.* Norton, 11 Mees. & W. 913, 928.

[2] An action may be maintained against it in its new name by showing the fact that its name has been changed without any change of its corporate composition. Welfley *v.* Shenandoah &c. Co., 83 Va. 768.

[3] Dean *v.* La Motte Lead Co., 59 Mo. 523. Compare Longley *v.* Longley Stage Co., 23 Me. 39, where the corporators "concluded to rub out and begin anew."

[4] Reading *v.* Wedder, 66 Ill. 80; Com. *v.* Pittsburgh 41 Pa. St. 278.

[5] Bucksport &c. R. Co. *v.* Buck, 68 Me. 81; Greenville &c. R. Co. *v.* Johnson, 64 Tenn. (8 Baxt.) 332.

[6] Welfley *v.* Shenandoah Iron Co., 83 Va. 768; *s. c.* 3 S. E. Rep. 376.

[7] Water Lot Co. *v.* Bank of Brunswick, 53 Ga. 30.

[8] St. Louis &c. R. Co. *v.* Miller, 43 Ill. 199; *ante*, § 267.

[9] Porter *v.* Nekervis, 4 Rand. (Va.) 359.

[10] Drew *v.* Nat. Exchange Co., 1 Pat. Sc. App. 953.

may sue in the name which it has acquired by *reputation* or *usage*, though it may not be the name designated in its charter.[1] It nevertheless remains that it is *unsafe* for the *pleader* to depart from the legal name and to draw his pleading in the popular name; for, as has been said by a writer of distinction, "a name in a grant or obligation, to or by a corporation, may be sufficient to enable the corporation to enjoy or to make it liable, which would not be sufficient in an action by or against it."[2] It is pointed out by the same writer that, if the name of a corporation is lawfully *changed*, and not the identity of the corporation itself, the action should, in general, unless provision be otherwise made, be brought in the *new name*.[3] Thus, where a *town* is merged into a *city*, and all the records and property of the former are vested in the latter, an action on a written obligation made to the town before the consolidation, should be brought in the name of the city, and can not be brought in the name of the town.[4] And if a written promise be made to a corporation, by a name different from its corporate name, it may sue in its true name, and allege that it is the party to whom the promise or obligation was made,[5] and an allegation that the defendants acknowledged themselves to be bound unto the plaintiffs, by the description, etc., is equivalent to such an averment.[6]

§ **291. Misnomer of Corporation in Pleading.**—The misnomer of a corporation in pleading is usually available only by plea in *abatement*, and not by plea in *bar*;[7] nor is it a ground of non-

[1] *Ante*, § 286.

[2] Dill. Mun. Corp. (4th ed.), § 181; citing Cambridge University *v.* Archbishop of York, 10 Mod. 208; Brittain *v.* Newland, 2 Dev. & Bat. (N. C.) 363; Insane Hospital *v.* Higgins, 15 Ill. 185; Berks County &c. *v.* Myers, 6 Serg. & R. (Pa.) 12; Clark *v.* Potter County, 1 Pa. St. 159, 163; Porter *v.* Blakely, 1 Root (Conn.), 440; Kentucky Seminary *v.* Wallace, 15 B. Monr. (Ky.) 35; Romeo *v.* Chapman, 2 Mich. 179; County Court *v.* Griswold, 58 Mo. 175; Carder *v.* Commissioners, 16 Oh. St. 353; Trustees *v.* Campbell, 16 Oh. St. 11.

[3] 1 Dill. Mun. Corp. (4th ed.), § 181; citing Colchester *v.* Seabar, 3 Burr. 1866; Reg. *v.* Ipswich, 2 Ld. Raym. 1232, 1238.

[4] Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36.

[5] 1 Dill. Mun. Corp. (4th ed.), § 181; citing African Society *v.* Varick, 13 Johns. (N. Y.) 38; Trustees *v.* Reneau, 2 Swan (Tenn.), 94; Ft. Wayne *v.* Jackson, 7 Blackf. (Ind.) 36.

[6] African Society *v.* Varick, *supra*.

[7] Burnham *v.* Savings Bank, 5 N. H. 446

suit. It was so held where the true name of the corporation was "the mayor and burgesses of the borough of Stafford in the County of Stafford," and the declaration laid the name as "the mayor and burgesses of the borough of Stafford."[1] This case draws a distinction between the mere misnomer of a corporation and the bringing of an action by a person altogether different, or not *in rerum natura*. "When a corporation is sued, if the name of the corporation is mistaken, materially and substantially, the corporation cannot be affected by the proceedings. There is, in these cases, a distinction made between a variance in words and syllables only, and a variance in substance. If a corporation be sued by a name varying only in words and syllables, and not in substance, from the true name, — the misnomer must be pleaded in abatement, otherwise it will not be regarded. But if the name be mistaken in substance, the suit can not be regarded as against the corporation."[2]

§ 292. Effect of Variances in Corporate Name. — In a suit upon a contract relative to the purchase of certain shares of stock, the contract offered by the plaintiff in evidence disagreed with the plaintiff's declaration as to the name of the corporation; but since the identity of the corporation was apparent from the recital in the contract and from the records of the corporation, to which the contract referred, this variance constituted no defense.[3] - - - - In an action of covenant, the plaintiff, a corporation by prescription, alleged a grant to it by the defendant's ancestor under a name differing in some respects from that by which it had been known during the past one hundred years. Upon this point the court was clear that the deed of an ancestor describing a corporation by a certain name must be evidence against those who claim from him that the corporation was then known by that name.[4] - - - - Where a promissory note was given to "the president, directors and company of the Newport Mechanics' Manufacturing Company," instead of "the Newport Mechanics' Manufacturing Company," which was the true name of the corporation in whose favor the note was intended to be drawn,— it was held that there was no such variance as would preclude a recovery by the corporation suing by its

[1] Mayor and Burgesses *v.* Bolton, 1 Bos. & P. 39.

[2] Burnham *v.* Savings Bank, 5 N. H. 446, 449, opinion by Richardson, C. J.

[3] Dodge *v.* Barnes, 31 Me. 290.

[4] Mayor of Carlisle *v.* Blamire, 8 East, 487.

correct name.[1] - - - - The plaintiff, claiming to be a corporation by the laws of New York, in Missouri sued by the name of "The Bank of Commerce." The articles of association, produced to prove the plaintiff's right to sue as a corporation, declared that the name to be used should be "Bank of Commerce, in New York." It was held that the articles offered were not competent evidence to prove the existence of a corporation bearing the *name* of the plaintiff.[2] - - - - In an action against an incorporated bank, the writ described the defendants by their corporate name of "the president and directors of the Marine Bank of Baltimore." The declaration ran against "the said Marine Bank." The plea was that "the Marine Bank" did not assume, etc.; and the verdict and judgment used the corporate name. It was held, on objections made to the declaration, that it was sufficient.[3] - - - - An ejectment was brought upon the demise of "the mayor, aldermen, capital burgesses and commonalty of the *borough town of Malden*." The name of the corporation was "the mayor, aldermen, capital burgesses and commonalty of *Malden*." It was held that there was no variance.[4] - - - - A judgment recovered against "the president, directors and company of the Lafayette Insurance Company" may be sued upon as a judgment against the "Lafayette Insurance Company," the declaration averring that the judgment was recovered against the defendants by the former name.[5]

§ 293. What Misnomers Amendable.—If the distinction of an English case is attended to, that between the mere misnomer of a corporation and the bringing of an action by a person altogether different from that named in the declaration, or by a person not in existence,[5] there will be no difficulty in solving the question under what circumstances amendments ought to be allowed so as to cure misnomers of corporations in pleadings. In a well considered case in Alabama the court, after examining several authorities, concluded "that the authorities adduced establish the conclusion, that there is a well marked distinction between a misnomer, which incorrectly *names* a corporation, but correctly *describes* it, and the statement in the pleading of an

[1] Newport Mechanics' Man. Co. *v.* Starbird, 10 N. H. 123.

[2] Bank of Commerce *v.* Mudd, 32 Mo. 218.

[3] Marine Bank *v.* Biays, 4 Harr. & J. (Md.) 338.

[4] Doe *v.* Miller, 1 Barn. & Ald. 699.

[5] Lafayette Ins. Co. *v.* French, 18 How. (U. S.) 404.

[6] Mayor & Burgesses *v.* Bolton, 1 Bos. & P. 39.

entirely different party. This conclusion being attained, the question in this case is stripped of embarrassment."[1] The distinction is that an amendment is always allowable, curing a mere misnomer of the real party which sues, but that an amendment is not allowable introducing an entirely different party as plaintiff, unless such party may properly be introduced as the successor in interest of the party originally bringing the action. And the same rule would, it is supposed, apply, *mutatis mutandis*, where a corporation is defendant.

§ 294. Effect of Misnomer of Corporations in Written Obligations.—It is laid down in an old case[2] that in all grants by or to corporations, if there is enough expressed to show that there is such an artificial being, and to distinguish it from others, the body politic is well named, although there is a variance of words and syllables. It is laid down by Chancellor Kent that "a misnomer in a grant by statute, or by devise, to a corporation, does not avoid the grant, though the right name of the corporation be not used, provided the corporation really intended it to be made apparent."[3] In the earliest American treatise on the law of corporations it is said: "In a devise to a corporation, if the words (though the name be entirely mistaken) show that the testator could only mean a particular corporation, it is sufficient.[4] And there is a general concurrence of modern authority to the effect that "*a misnomer or variation* from the precise name of the corporation in a *grant* or *obligation* by or to it, is not material, if the identity of the corporation is unmistakable, either from the face of the instrument or from the averments and proof."[5] It was said by Gibson, J., that

[1] Smith *v.* Plank Road Co., 30 Ala. 650, 663.

[2] 10 Co. Rep. 135.

[3] 2 Kent. Com. 292.

[4] Ang. & A. Corp. (1st ed.), p. 379. These propositions were quoted with approval in Vansant *v.* Roberts. 3 Md. 119, 127, 128.

[5] 1 Dill Mun. Corp. (3rd ed.), § 179; cited with approval in Neely *v.* Yorkville, 10 S. C. 141. To the same effect see Inhabitants *v.* String, 10 N. J. L. 323; Kentucky Seminary *v.* Wallace, 15 B. Monr. (Ky.) 35; New York Conference *v.* Clarkson, 8 N. J. Eq. 541; Pendleton *v.* Bank of Kentucky, 1 T. B. Monr. (Ky.) 177; Medway Cotton Man. Co. *v.* Adams, 10 Mass. 360; People *v.* Love, 19 Cal. 676; African Society *v.* Varick, 13 Johns. (N. Y.) 38; Woolwich *v.* Forrest, 2 N. J. L. 84; Bower *v.* State Bank, 5 Ark. 234; Pierce *v.* Somersworth, 10 N. H. 369; Douglas *v.* Branch Bank, 19 Ala. 659;

"a departure from the strict style of the corporation will not avoid its contract, if it substantially appear that the particular corporation was intended; and that a latent ambiguity may, under proper averments, be explained by *parol evidence* in this, as in other cases, to show the intention."[1] In determining whether or not the instrument, although misnaming the corporation, makes its identity apparent, the court will look, not only to the language of the instrument, but will also consider *surrounding circumstances*.[2] A good illustration of this principle is found in a case where an individual had become the purchaser of a railway, and thereafter took a lease of certain premises to be used in connection with the railway, the lease being made to the railway by its prior *corporate* name and not to the *individual* owner of it. It was held that the lease was good enough as a lease to the individual. "If he took the lease under that name, it would bind him by the name he assumed, and it is immaterial that there was no corporation of the name of the lessee."[3]

§ **295. Misnomer in Devises and Bequests.** — A misnomer in a *devise* or *bequest* intended to be made to a corporation will not make it void, but *parol evidence* may be resorted to to show what corporation was intended.[4] The principle that parol evidence

Pittsburgh *v.* Craft, 1 Pitts. (Pa.) 77; St. Louis Hospital *v.* Williams, 19 Mo. 609; People *v.* Runkel, 6 Johns. (N. Y.) 334: Brock District *v.* Bowen, 7 Up. Can. Q. B. 471; Trenton &c. Road Co. *v.* Marshall, 10 Up. Can. C. P. 337; Whitby *v.* Harrison, 18 Up. Can. Q. B. 603; Bruce *v.* Cronar, 22 Up. Can. Q. B. 321; The Case of Mayor &c. of Lynne Regis, 10 Co. Rep. 120, 122; Mayor of Carlisle *v.* Blamire, 8 East, 487; Rex *v.* Croke, Cowp. 29; Beverley *v.* Barlow, 10 Up. Can. C. P. 178; Re Goodwin *v.* Ottawa &c. R. Co., 13 Up. Can. C. P. 254.

[1] President &c. *v.* Myers, 6 Serg. & R. (Pa.) 12. See also Milford &c. Co. *v.* Brush, 10 Oh. 111; Newport Mechanics' Man. Co. *v.* Starbird, 10 N. H. 123; Society for Propagating the Gospel *v.* Young, 2 N. H. 310; Trustees *v.* Peaslee, 15 N. H. 317; Bodman *v.* American Tract Society, 9 Allen (Mass.), 447.

[2] Vansant *v.* Roberts, 3 Md. 119.

[3] Ecker *v.* Chicago &c. R. Co., 8 Mo. App. 223, 226.

[4] Hornbeck *v.* American Bible Society, 2 Sandf. Ch. (N. Y.) 133; General Lying-in Hospital *v.* Knight, 21 L. J. (Ch.) 537; *s. c.* 11 Eng. L. & Eq. 191; Winslow *v.* Cummings, 3 Cush. (Mass.) 358; Telfair *v.* Howe, 3 Rich. Eq. (S. C.) 235; Carter *v.* Balfour, 19 Ala. 814; Brewster *v.* McCall, 15 Conn. 274; Ayres *v.* Weed, 16 Conn. 291. The rule is analogous to the rule that, in applying the clause of a *deed* to the *land*, parol evidence is admissible, and the question becomes a question of fact for a jury. 1 Thomp. Tr., § 1461, *et seq.*

may be resorted to is peculiarly applicable, where there are *two* associations of the same name which is used by the testator.[1] Indeed, a devisee may be designated by *description*, as well as by name; and such a description is as available in the case of a corporation as in the case of a natural person.[2] Illustrations of this principle will be given hereafter.[3]

§ **296. Corporation Protected in Use of Corporate Name.** — The name of a corporation is a necessary element of its existence, and, aside from any statute, the right to its exclusive use will be protected, upon the same principle which protects persons in the use of *trade-marks*.[4] An injunction may be granted, by analogy to the law of trade-marks, to a corporation, to restrain persons from adopting and using the same corporate name with that previously adopted, regularly and in good faith, by complainant;[5] or an injunctive order may require a sufficient modification of the name to prevent confusion and obviate just objection.[6] The same principle has been acted upon in respect of the organization of *companies* in England, under the companies act of 1862. A company, not registered under that act, can restrain the registration of a projected new company, which is intended to carry on the same business as the unregistered company, and to bear a name so similar to that of the unregistered company as to be calculated to deceive the public.[7] Such a restraining order can, however, be avoided, by the defendant giving an undertaking not to carry on business in the threatened name, but to assume another name which will not lead to confusion.[8] The English courts proceed upon the view that the principles applicable to individuals trading under identical or similar names apply equally to companies. They have never taken up with the untenable view that the name of a company, organized under

[1] Bodman *v.* American Tract Society, 9 Allen (Mass.), 447.

[2] Brewster *v.* McCall, 15 Conn. 274.

[3] *Post*, Ch. 127, Art. I.

[4] Boone on Corp., § 32; Newby *v.* Oregon &c. R. Co., 1 Deady (U. S.), 609; Ex parte Walker, 1 Tenn. Ch. 97; *s.c.* 9 Am. Rep. 324.

[5] Newby *v.* Oregon &c. R. Co., 1 Deady (U. S.), 609; Holmes *v.* Holmes &c. Manuf. Co., 37 Conn. 278.

[6] Ex parte Walker, 1 Tenn. Ch. 97.

[7] Hendricks *v.* Montagu, 17 Ch. Div. 638.

[8] Guardian Fire &c. Ass. Co. *v.* Guardian and General Insurance Co., 50 L. J. Ch. 253.

the companies act of 1862, is a *franchise*, so that it can do business under the name, although it is a name identical with that of a previously existing company, or so nearly identical with it as to produce confusion between the two companies in the minds of the public, and so work a fraud on the prior company. If, therefore, a company has been registered under the same name as a prior company, it may be restrained from carrying on business under the same or a similar name.[1] But a Federal court can not interfere to prevent the organization of a corporation bearing the same name as that of a *foreign corporation* doing business in the State.[2] The theory of this decision is that it is not competent for the Federal courts to interfere with the officers of the States in the exercise of their powers in creating corporations. Neither will a State court, according to an untenable view, entertain a proceeding to oust a younger corporation of its right to use a certain name on the ground of interference with the name adopted by an older corporation,—for the reason that a corporate name, although acquired under a general law in the mode there pointed out, is in the nature of a *franchise*, which can no more be impeached by private persons than can the franchise to be a corporation.[3] The theory of this decision is that the certificate granted to a corporation by the Secretary of State, as provided by statute, is *conclusive*, not only of its right to be a corporation,[4] but also of its right to be a corporation under the name designated therein. Under this theory there would seem to be no remedy whatever for such an infringement,—not even in a suit by the State at the relation of the attorney-general. A technical course of reasoning, which leaves a wrong of this kind without any remedy, is not creditable to any system of jurisprudence. The better view is that the right of an existing corporation to

[1] Merchant Banking Co. *v.* Merchant's Joint Stock Bank, 9 Ch. Div. 560. The companies act of 1862 provides (§ 20) that "no company shall be registered under a name identical with that by which a subsisting company is already registered, or so nearly resembling the same as to be calculated to deceive," except in certain cases.

[2] Lehigh Valley Coal Co. *v.* Hamblen, 23 Fed. Rep. 225. *Quære*, whether, after organization, it could interfere to prevent the use of the name in fraud of the rights of a foreign corporation. *Ibid.*

[3] Boston Rubber Shoe Co. *v.* Boston Rubber Co., 149 Mass. 436.

[4] Rice *v.* National Bank, 126 Mass. 300.

the use of its corporate name, which is in the nature of a trade name, cannot be infringed by a subsequent act of incorporation by the legislature, either by the direct grant of a charter to a corporation to be organized under a similar name, or through a ministerial officer of the State in granting a certificate of incorporation to a body of adventurers having a similar name. The right of doing wrong and of committing fraud cannot, although thus conferred by or under a statute, be of such a sacred character as to be beyond the corrective power of the judicial courts. While the Massachusetts case may have been well decided on its facts, the better view of the ruling principle is that, while the use of a corporate name similar to that of a previously created corporation cannot be enjoined, if its adoption and use have proceeded in *good faith* and without any *fraudulent intent*, yet that, if its adoption and use have proceeded with the fraudulent intent of appropriating the trade of the prior corporation, by deceiving the public and producing a public confusion between the two corporations, the use of such name will be enjoined;[1] though to warrant such relief the fraudulent intent ought to be established by very satisfactory proof.[2] It is also a view worthy of consideration that, where the State has granted to one corporation the right to use a particular name, that grant is a *contract*, and that the obligation of the contract is impaired by a subsequent grant by the State to another corporation to use a similar name; so that the subsequent grant, whether emanating from a special charter or accruing under a general law, is beyond the power of the State, under the Federal constitution, and hence necessarily subject to the corrective jurisdiction of the courts.

§ 297. **Illustrations.** — A manufacturing corporation existed under the laws of Connecticut, which took its name from its principal stockholders, and whose names were Holmes, Booth and Haydens. Several of the corporators and directors of this corporation organized another corporation under the name of "The Holmes, Booth & Atwood Manufacturing Company," for the purpose of carrying on the same business as that done by the former corporation. On petition of the old corporation, the new corporation was enjoined from carrying on business under

[1] Plant Seed Co. *v.* Michel Plant & Seed Co., 23 Mo. App. 579; *s. c.*, on second appeal, 37 Mo. App. 313.

[2] *Ibid.*, 37 Mo. App. 313.

the name which it had assumed. The court, speaking through Carpenter, J., said: "The law having authorized the selection of a name, and having declared the name so selected to be the name of the corporation, we see no reason why the law shonld not protect the corporation in the use of that name, upon the same principle, and to the same extent, that individuals are protected in the use of trade-marks. Hence, it necessarily follows that corporations, in the exercise of discretionary powers conferred by the statute, must so exercise them as not to infringe upon the established legal rights of others."[1] - - - - In a Federal case, a corporation was enjoined from using as their corporate name the words "The Oregon Central Railway Company," there being a prior corporation having that name.[2] - - - - The corporate *name*, the "United States Mercantile Reporting Company," is infringed by the use of the name "United States Commercial Agency & Collecting Company," by a corporation engaged in the same business as the former; and a company will hence not be allowed, on a petition for change of name, to take the latter name.[3] - - - - A bill filed by a stockholder in a long-established corporation, alleging that a corporation several years old, of which plaintiff was also a stockholder, and having for a corporate name the same name as had been for many years used by the first corporation as a trade name, had, contrary to representations made by its manager and treasurer to plaintiff when he induced him to purchase stock, determined to engage in the same business as the older corporation; that the latter's trade name would be infringed thereby; that the younger company would be at great expense in defending infringement suits by the other company; and that plaintiff's stock in both corporations would therefore decrease in value, — cannot be maintained, either against the younger company, to enjoin its embarkation in the new business, or against its treasurer and manager, to prevent his voting therefor, or for general relief.[4] - - - - A company claiming to have been incorporated under the laws of Michigan, commenced doing business in Illinois, under its assumed corporate name. Subsequently, another company became incorporated by the same name, under the laws of Illinois, and commenced business in the same city in that State where the former company was established. The second company then brought a bill in equity to enjoin the prior company from the use of its assumed corporate name, alleging that its corporate character no longer existed,

[1] Holmes, Booth & Haydens *v.* The Holmes, Booth & Atwood Mfg. Co., 37 Conn. 278; *s. c.* 9 Am. Rep. 324.

[2] Newby *v.* Oregon &c. R. Co., 1 Deady (U. S.), 609.

[3] Re U. S. Mercantile Reporting &c. Assoc., 22 N. Y. St. Rep. 494; *s. c.* 4 N. Y. Supp. 916.

[4] Converse *v.* Hood, 149 Mass. 471; 21 North East. Rep. 878; 17 Mass. L. Rep. 18; 26 Am. & Eng. Corp. Cas. 118.

but that it had been ousted of its corporate franchises by a proceeding in the State of Michigan, and that it had made an assignment and no longer acted as a corporation. It was held that this disclosed no ground for the relief sought. Whether the defendants were a corporation was immaterial, nor was it material whether or not their original incorporation was legal; since they still had a right to prosecute their business as partners under the name which they had originally adopted, and the *subsequent* organization of the plaintiffs into a corporation by the same name could give them no equity to have the defendants enjoined from so doing.[1] - - - - Where an English company existed under the name of "The Merchant Banking Company of London, Limited," and thereafter another company was registered under the statute with name of "The Merchants' Joint Stock Bank, Limited," and established itself in business in another place in London, and there was no fraud, an injunction was refused.[2] - - - - A loan and trust company, which has taken the name of the State in which it does business as a part of its corporate name, has been refused an injunction restraining a similar use of the name of the State by another loan and trust company doing business at a point 100 miles distant, the proof not showing a conflict of interest, or that the business transacted by defendants would materially interfere with plaintiff's business.[3]

§ 298. Discretion of Secretary of State as to Issuing Certificate of Incorporation for a Corporation having a Similar Name to one already Existing. — By the statute of Missouri relating to the organization of corporations it is provided: "No certificate of its incorporation, or certificate of its change of corporate name, shall be issued by the Secretary of the State, to any company or association: First, under the same corporate name and style as that already assumed by another corporation," etc.[4] Another section of the same statute provides in detail of what the articles of association shall consist. It is then made the duty of the Secretary of State to give a certificate that the corporation has been duly organized, and that certificate is made evidence of the corporate existence of such corporation, in the courts. That section, among other things, declares that

[1] Ottoman Cahvey Co. *v.* Dane, 95 Ill. 203.

[2] Merchant Nat Banking Co. *v.* Merchants' Joint Stock Bank, 9 Ch. Div. 560; *s. c.* 47 L. J. Ch. 828; 26 Week. Rep. 847.

[3] Nebraska Loan & Trust Co. *v.* Nine, 27 Neb. 507.

[4] R. S. Mo. 1879, § 762.

the articles of agreement shall set out "the corporate name of the proposed corporation, which shall not be the name of any corporation heretofore incorporated in this State for similar purposes, or an imitation of such name."[1] Under this statute it is held that, while the duty thus imposed upon the Secretary of State is a ministerial one, yet it is not a sound view that he cannot refuse to give the certificate of incorporation on the ground of a similarity of the proposed corporate name to the name of some existing corporation, unless the names are exactly the same; but that he has a discretion so far that he will not be compelled by *mandamus* to issue a certificate where the proposed name so nearly resembles the name of an existing corporation that confusion on the part of the public would be likely to arise between the two corporations.[2]

§ 299. Illustration: "Kansas City Real Estate Exchange"— "Kansas City Real Estate and Stock Exchange." — The court therefore refused a *mandamus* to the Secretary of State to compel him to issue a certificate of incorporation to "The Kansas City Real Estate Exchange," when there was another corporation duly organized and located at the same place, and for the same purpose, by the name of "The Kansas City Real Estate and Stock Exchange," to which the Secretary of State had previously issued a certificate of incorporation. The court said: "It is the evident purpose of our statute to protect, to some extent, these common-law rights, and, to do this, both as to the corporation first adopting the name, and as to the public, which may be misled by the similarity of the two names. It is difficult to state a precise rule by which one name may be said to be an imitation of another, in the sense of the statute. Where, however, the names so far resemble each other, that a person using that care, caution, and observation which the public uses, and may be expected to use, would mistake one for the other, then the new name is to be regarded as an imitation of the former. The character of the business, and the location of the two corporations, must be considered. Now, in the present case, both corporations are located in the same city. Both are created for precisely the same purposes, *i.e.*, to establish and maintain a place, with a suitable building, for the public and private sale of real estate, stocks, and other property. The only difference between the two names consists in the use of the

[1] *Ibid.*, § 762.

[2] State ex rel. *v.* McGrath, 92 Mo. 355; *s. c.* 5 S. W. Rep. 29; 10 West. Rep. 391; 36 Alb. L. J. 165; 2 Rail. & Corp. L. J. 252.

words 'and stock.' These words appear in the name of the former corporation, but are omitted in the name adopted by the relators. The omission of them from the combination with the other words, it is believed, does not furnish a fair distinguishing feature. A reasonably prudent person would be constantly liable to mistake the one for the other. It is doubtless the purpose of both corporations to encourage the public sale of property, real and personal, at their place of business, under mortgages, deeds of trust, and the like, and the names ought not to be so similar as to lead to confusion and litigation."[1]

§ 300. Prohibition in Missouri Statute against Use of Name of Person or Firm.— The Missouri statute touching the organization of corporations provides: "No certificate of its incorporation, or certificate of its change of corporate name, shall be issued by the Secretary of State to any company or association: . . . Second, when the corporate name and style assumed is the name of a person or trade firm, unless there be joined thereto some word designating the business to be carried on, followed by the word 'company' or 'corporation." The Missouri Secretary of State refused a certificate of incorporation to an association of persons who had assumed the name of "Mallinckrodt Chemical Works." The Supreme Court awarded a peremptory writ of *mandamus* to compel him to issue the certificate, taking the view that the corporate name above assumed contained neither the name of a person nor the name of a firm. The court say: "The law supposes every person to be designated by two names, one a family name, and the other the name given to him at his baptism, and denominated his Christian name.[2] The family name is that portion of the name of an individual which is employed by him in common with other members of his family, and, therefore, fails to designate any particular individual. 'Mallinckrodt' is a family name, and not the name of a 'person' or individual, and need not, therefore, be followed by the word 'company' or 'corporation.' The object of the statute in question, undoubtedly was to prevent corporations from conducting business in firm names and in the names of individuals, thereby misleading the public into the belief that they are dealing with individuals, and are entitled to the protection afforded by their personal liability. The name assumed in the case before us, contravenes neither the letter nor the spirit of the statute."[3]

[1] State ex rel. &c. *v.* McGrath, 92 Mo. 355, 358.

[2] Citing Frank *v.* Levie, 5 Robt. (N. Y.) 599; Bac. Abr. vol. 7, p. 7.

[3] State ex rel. *v.* McGrath, 75 Mo. 424, 426.

CHAPTER IX.

CONSOLIDATION.

ARTICLE I. IN GENERAL.

§ **305. Statutes providing for Consolidations.** — Statutes no doubt exist in most of the States providing for the consolidation of railroad companies, and some of them extend the priv-

ilege to other corporations. The leading provisions of a few of these statutes have been collected, and are given merely as examples of the Amercian statute law on the subject. Owing to the necessity of economizing space, it has not been found practicable to reproduce the exact language.[1]

§ **306. California: Railroad Companies.** — Two or more railroad corporations may consolidate their capital stock, debts, property, assets and franchises, in such manner as may be agreed upon by their respective boards of directors. No such amalgamation or consolidation must take place without the written consent of the holders of three-fourths in value of all the stock of each corporation; and no such amalgamation or consolidation must in any way relieve such corporation or the stockholders thereof from any and all just liabilities. In case of such amalgamation or consolidation, due notice of the same must be given by advertisement for one month in at least one newspaper in each county, if there be one published therein, into or through which such road runs, and also for the same length of time in one paper published at Sacramento, and in two papers published in San Francisco. And when the consolidation and amalgamation is completed, a copy of the new articles of incorporation must be filed in the office of the Secretary of State.[2] - - - - Mining companies are also permitted to consolidate in this State.[3]

§ **307. Colorado.**—In this State ditch companies, mining companies, telegraph companies and railroad companies may consolidate. The pro-

[1] RECENT STATUTES: *Arkansas.*— Unjust discrimination and exorbitant charges of railroads; consolidation with, leasing, or purchasing any parallel or competing line; officers acting at the same time as officers of two such lines; or their being interested in furnishing supplies to the same; and discrimination between transportation companies and individuals prohibited. Ark. Act March 24, 1887; Acts 1887, No. 81, p. 113. *Florida.*— The consolidation of parallel or competing lines of railway, except when special authority is given by the State Railroad Commission, prohibited. Fla. Act, June 7, 1887; Acts 1887, c. 3745, No. 65, p. 117. *Tennessee.* —The provisions for the consolidation of railroads (Mill. & V. Stats., § 1272), amended, by including street railroad corporations in its provisions. Tenn. Act, March 26, 1887; Acts 1887, c. 189, p. 321. Certain specified corporations prohibited from consolidating, or acquiring from each other, by contract or otherwise, the franchises or property of the other, except with the consent of the municipal governments of the cities or towns in which they are located or carry on their business. Tenn. Act, March 19, 1889; Acts 1889, c. 70, p. 97.

[2] Deering Ann. Codes Cal. 1885, Civ. Code, § 473.

[3] *Ibid.* § 361.

cedure in the case of the different companies is substantially the same, the statute relating to railroad consolidation being the most typical and most technical. The steps to bring about a consolidation of railroad companies are: (1.) That the directors of each company call a separate meeting of the stockholders to vote on the proposition, and if it is adopted by a vote of three-fourths of the stock of each company, the consolidation is approved. The directors now elect their quota of new directors, less one, who is supplied at a general meeting. (2.) A certificate is prepared, setting forth the fact of consolidation, and all matters necessary in an original certificate of incorporation. It is signed by three stockholders of each company, is filed with the Secretary of State and lodged for record in each county through which the roads run. (3.) The directors of each of the old companies must formally convey its property to the new company, and must call in its stock and cancel it, and issue in lieu thereof stock of the new company; but the certificates of original stock must be produced by their holders, or satisfactory evidence given of destruction, before the new certificates are issued. The consolidated company assumes all the liabilities and duties of the several companies; but no pending suits or causes of action shall be affected, nor shall any action or right of action abate. Special notice to the public is required in case of the consolidation of railroad and telegraph companies, and competing parallel lines of railroad or telegraph shall not consolidate. Domestic companies may consolidate with foreign companies, (1) if permitted by the laws of the State or territory of such foreign corporation; (2) if the line of the home company reaches the State boundary, and forms a continuous or connected line with the line of the foreign company; (3) if the two lines be not parallel or competing lines; (4) provided, that the consolidated company shall not form a foreign corporation.[1] This last provision is contained in the constitution of Colorado.[2]

§ **308. Illinois.** — By the statutes of Illinois it is provided: **(1.) If** the board of directors, managers or trustees of a corporation shall desire to consolidate with another, they may call a meeting of the stockholders for the purpose of submitting the question of such consolidation to their vote; but not more than two companies can consolidate and they must be corporations of the same kind, engaged in the same general business, and in the same vicinity. (2.) Due notice of the meeting to consider the question of consolidation must be given for thirty days, such as is generally prescribed in case of special meetings, the call for which must be signed by a majority of the board of directors, managers or trustees.

[1] Gen. Stat. Colo. 1883.

[2] *Post*, § 320.

(3.) The proposition for consolidation may be adopted by a vote, personal or by proxy, of two-thirds of all the shares. (4.) A certificate of such fact, verified by the president by affidavit, and under the seal of the corporation, is to be filed in the office of the Secretary of State, and also in the office of the Recorder of Deeds of the county of the principal business office of the corporation. The consolidated company subjects itself to the general laws of the State relating to corporations. Public notice of the consolidation in some newspaper must be given for three weeks. (5.) Corporations not having a joint-stock may effect such consolidation by a majority vote. (6.) Such consolidation is not to affect suits pending in which either of the corporations are parties, nor to affect causes of action, nor the rights of persons, in any particular; nor shall suits abate against either corporation.[1] - - - - When corporations chartered and organized under the laws of Illinois consolidate, their property, stock or franchises with another company or companies, the consolidated company becomes liable for all debts or liabilities of each of the constituent companies, existing or accrued prior to the consolidation, and actions may be brought, maintained and recovered therefor against such consolidated company.[2] - - - - If a railroad company desires to consolidate with any other railroad company, a notice of sixty days must be given before the meeting called to consider the question and a general notice published for nine consecutive weeks. No railroad company shall consolidate with another operating a parallel or competing line.[3]

§ **309. Michigan: Railroad Companies.**— (1.) By the statute of Michigan it is provided that any railroad company in that State, forming a continuous or connected line with any other railroad company, may consolidate with it, either in, or out or partly in and partly out of the State, — provided that companies owning parallel or competing lines shall not consolidate. (2.) The steps required to effect the consolidation are, that the directors of two or more companies shall enter into an agreement with each other under their corporate seals for a consolidation, prescribing the terms, mode of effecting the union, name of the new company, number of its directors, which shall be not less than six nor more than fifteen; names of the first directors, time and place of the election of the new board, which shall not exceed six months after the scheme of consolidation has received the sanction of the stockholders; the number of shares of the new company, the capital stock, the amount of each share, the manner of converting the shares of stock into

[1] Ill. Ann. Stat. (Starr & Curt.) p. 624, § 50.

[2] *Ibid.*, p. 627, § 65.

[3] *Ibid.*, § 57.

stock of the new company, together with other necessary details. (3.) The agreement must be submitted to a vote of the stockholders, notified by publication in some newspaper published in Detroit, and also in a paper published in each county through which the railroad passes, for four successive weeks, the first publication to be at least sixty days before the vote is taken on the question of consolidation, the notice to be signed by the secretary of the company intending to have such a meeting and vote. At the meeting the scheme of consolidation may be adopted by the votes of a majority in interest. (4.) A copy of the contract of consolidation must be filed, in accordance with an act "to provide for the incorporation of railroad companies," passed February 12th, 1855, and its amendatory acts, with the Secretary of State, and a certified copy of it by the Secretary of State is evidence in all courts. (5.) The companies are now merged in the new corporation, in pursuance of the agreement of consolidation. All franchises and rights of every kind of the old companies are transferred to and vested in the new company; but all rights of creditors, and liens on property of either of the constituent companies, remain unimpaired; and the respective companies are deemed to exist so far as necessary to enforce the same. All debts, liabilities, and duties of either of the old companies attach to the new and are enforcible against it, as though incurred by it.[1]

§ **310. Missouri: Railroad Companies.** — By the Missouri statutes it is provided: (1.) That two or more railroad companies, owning railroads forming a continuous line, may consolidate and form one company, owning such continuous road, with all powers, rights and privileges and immunities, and subject to all obligations and liabilities of the constituent companies. (2.) The steps to effect a consolidation are: *a.* The companies enter into an agreement as to the terms and conditions of the consolidation, and this is ratified by a majority in interest of the stock in each company, at a meeting of stockholders regularly called for that purpose, or by approval *in writing* of such majority in interest. *b.* A certified copy of the articles of consolidation is filed with the Secretary of State, and a certificate from his office is conclusive evidence of the consolidation. *c.* The board of directors of the new company may thereupon carry out the contract of consolidation. (3.) Only continuous lines of railroad can be thus merged, so as not to deprive the public of competition, and any prohibited consolidation is void, and any person may bring an action in the circuit court of any county through

[1] Howell Mich. Stat. 1882, § 3343. The *notice* of each company is to be *signed separately* by its own secretary only, and to be *published* only in the counties through which its own road passes. Wells *v.* Rodgers, 60 Mo. 525.

which the railroad passes, which shall have jurisdiction to grant an injunction against it. (4.) Companies must accept the provisions of article 2 of the general laws entitled "Railroad Companies," by a resolution filed with the Secretary of State, signed by their respective presidents and attested by their respective secretaries, and under the seal of the corporation, — which resolution shall be passed by a majority vote of the stock of each company, at a meeting called for the purpose, —sixty days' notice of the time, place and purpose of the meeting having been given in the newspapers in the county where its general office is located. (5.) Competing or parallel lines may not consolidate, nor may one such corporation in any manner exercise control over the road of the other, but each must be run and managed separately. The punishment for a violation of this provision is a fine and forfeiture of corporate franchises.[1]

§ 311. New York: Railroad Companies. — (1.) In this State railway companies may consolidate where their roads, or branches, or any part thereof form continuous connected lines. This may be between a company organized under the laws of New York or of New York and any other State, and a company organized under the laws of New York or of any other State. (2.) The steps taken to effect such a consolidation are: *a.* The directors may agree to consolidate, by an agreement under seal prescribing the terms, conditions and mode of consolidation, the name of the new company, the number and names of its directors and officers, the number and value of its shares, and all the details necessary to perfect a consolidation; but its capital stock shall not exceed the *sum* of the capital stock of the constituent companies, nor shall bonds or other evidences of debt be issued as a consideration for consolidated roads. The scheme of consolidation is to be submitted to the stockholders of each constituent company at a meeting *called* to consider the agreement. Due notice, specifying the object of the meeting, is to be given for a stated time previous thereto. Votes at the meeting are to be taken by ballot, and if two-thirds of the ballots favor consolidation, the fact shall be certified under seal by the secretary of the company, and a certified copy of the agreement so adopted shall be lodged with the Secretary of State. A certified copy by the Secretary of State, under his seal of office, is evidence of the corporate existence of the new company, in all courts. (3.) The new company thus created becomes one corporation, under the restrictions, disabilities and duties of its several constituent companies, but limited to the power of exacting a fare of two cents per mile for carrying passengers. (4.) It succeeds

[1] Rev. Stat. Mo. 1889, § 2567.

to all the rights, powers, franchises, rights of way, etc., of its constituent companies. (5.) Liens and rights of creditors upon the property of either of the constituent companies are preserved unimpaired, and each constituent company is to be deemed to be still in existence for the purpose of preserving the same. But all debts and liabilities, except mortgages, shall attach to the new company and be enforced against it, with the same effect as if incurred by it. No pending suits abate, but may be prosecuted in the name of the former corporation, or the new corporation may be substituted as a party. (6.) The consolidated company is assessed and taxed, as to its lines within the State of New York, as other railroad companies. (7.) It shall not, in any place, increase the rate of passenger fare beyond the limit above stated. (8.) This act of consolidation does not apply to street railway companies. (9.) The general act organizing and regulating railroad companies applies to consolidated companies. (10.) Parallel or competing lines cannot consolidate.[1]

§ **312. Ohio.** — In Ohio the following kinds of corporations may consolidate: railway companies;[2] magnetic telegraph companies;[3] bridge companies;[4] hydraulic companies;[5] turnpike or plank road companies;[6] fire and marine insurance companies;[7] religious societies;[8] societies for the relief of farm laborers and other charitable corporations.[9] The scheme of consolidation, prescribed by the statute in respect of each of these companies, follows the form prescribed for railroad companies as a type, and differs from it but little in details of procedure. Insurance companies must file an agreement of consolidation with the superintendent of insurance. Religious societies need give only such notice as is usual for calling together the congregation. Farm laborers' societies and charitable corporations, when consolidated, do not assume the debts of the constituent corporations. These acts of consolidation apply equally to other voluntary associations, but may apply to societies when incorporated. As to railway companies, a summary of the provisions of the statute, is: (1.) When lines of the several companies permit of a continuous passage of trains without a break or interruption from one to the other, the companies may consolidate; and when the line of a company reaches a boundary of the State and there forms a continuous line with the line of a company outside of the State, these

[1] Rev. Stat. N. Y. (Banks & Bros. 8th ed.) 1889, p. 1783, *et seq.*

[2] Rev. Stat. Ohio 1880, § 3379 *et seq.*

[3] *Ibid.*, § 3470.

[4] *Ibid.*, § 3547.

[5] *Ibid.*, § 3566.

[6] *Ibid.*, § 3506.

[7] *Ibid.*, § 3671 *et seq.*

[8] *Ibid.*, § 3777 *et seq.*

[9] *Ibid.*, § 3846.

companies may consolidate, and the fact that an unbridged river is interposed as a barrier between them does not prevent a consolidation. (2.) The steps to bring about such a consolidation are: *a.* The directors of the several companies form an agreement, fixing the terms of union, the number of the directors of the new company, the amount of its capital stock, number of shares and value of each, mode of converting the stock of the old companies into that of the new, and other necessary details. *b.* This scheme is to be submitted to the stockholders of each company, at a meeting called for the purpose, of which due notice is given,— though if all the stockholders are present they may waive notice. A vote by ballot is taken, and if two-thirds of the stock vote for the adoption of the scheme, the fact is certified by the secretary of each company, and the certificate is lodged with the Secretary of State. This completes the consolidation. The new company, thus formed, possesses within the State of Ohio all the rights, property and franchises, and is subject to all the restrictions and duties of the constituent companies. *c.* An election is held, upon due notice, for the first board of directors. (3.) The new company now assumes all the debts, liabilities and duties of the former companies, except liens, mortgages, etc., which are preserved unimpaired; and the several companies are deemed to be still in existence for the purpose of their enforcement. (4.) The new company must establish its principal office and give public notice of it, and may sue and be sued as other corporations; and its road, situated within the State of Ohio, is subject to taxation. (5.) Stockholders in the old companies, who refuse to have their shares converted into those of the new, shall be paid the highest market price for them which has obtained within six months previous to the consolidation; or if no agreement as to the price can be reached, it is to be submitted to arbitration. (6.) A certified copy of the agreement of consolidation, from the office of the Secretary of State, is conclusive evidence of the consolidation in the courts.[1]

§ **313. Pennsylvania.**—By the statutes of this State competing pipe lines and telegraph lines may not consolidate; and, in the case of telegraph companies, a violation of this provision works a forfeiture of franchises. The chapter relating to the consolidation of railway companies is very extensive, but the provisions are substantially the same as in other States. A summation of them is as follows: 1. Any railroad company chartered by this State may merge with any like company or with any foreign railroad company, where the lines of such companies unite so as to form a continuous line, intervening rivers being

[1] Rev. Stat. Ohio 1880, § 3379, *et seq.*

no obstacle; and they may consolidate where there is a connecting line. 2. The steps to effect such a consolidation are: *a.* An agreement formed between the boards of directors, in substance the same as that recited in the case of other States. *b.* This scheme submitted to the stockholders of each company, at a separate meeting duly called, and there subject to ratification by a majority vote of the stock. *c.* A certificate of consolidation filed with the Secretary of State, and this effects a merger of the companies. 3. The new company is possessed of all the rights, franchises and properties of the constituent companies. 4. All liens and rights of creditors are preserved against the property of the constituent companies to which they attach, which companies are deemed to exist for the purposes of their enforcement. 5. All debts, liabilities, etc., of the constituent companies attach to the new company. If differences exist in the statutes regulating the respective companies, the consolidated company is to be governed by the laws regulating the company into which the merger of the others has been made, — the statute thus recognizing the fact that the consolidation may take the form of an absorption by one company of several others, which, as hereafter seen,[1] is a frequent form of consolidation. A certified copy from the office of the Secretary of State, of the instrument of consolidation, is conclusive evidence thereof in the courts. A dissatisfied stockholder of the constituent companies may apply to a court to have arbitrators appointed, who shall estimate the damages caused to him by the consolidation, and the company may elect to pay him the market value of his shares, unaffected by the consolidation, or the damages found by the arbitrators, and he thereby becomes divested of his shares. The finding of the arbitrators of damages acquires the force of a judgment if not paid within thirty days. Executors, guardians or trustees of owners of shares may agree to contracts of consolidation or to contracts fixing the specific franchises to be given to the new company. The consolidated company may increase its capital stock as much as necessary to carry the purposes of the merger into effect. It has power to issue bonds, to mortgage its property, franchises, etc., as security therefor, and to deliver the bonds in discharge of the debts of the respective constitutent companies. Such bonds shall not exceed the whole amount of the indebtedness of the constitutent companies, nor bear more than seven per cent. interest. They are given in lieu, exchange, or satisfaction of the debts of the old companies, on such terms and conditions as the parties may make. If the consolidated company is composed of a foreign constituent, it must have an office in this State, and also be subject to taxation, as to its road in this State, under the laws thereof.[2]

[1] *Post*, § 330. [2] Bright. Purd. Dig. Penn. Stat., 11th ed. p. 1429, *et seq.*

§ **314. Texas.** — No general statute has been found in the statute books of Texas authorizing corporate consolidations, though no doubt such consolidations have been effected under special acts. There are in that State, however, *prohibitive statutes*, which seem to take rise in the constitution of the State, and are in the substance, — 1. That consolidation by lease, ownership, or the simple consolidation of competing or parallel lines of railroad, shall not be made. This prohibition is enforced by fining the officers, managers, etc., who have any voice or control of the corporations.[1] 2. Consolidations between Texas corporations and corporations created by other States are absolutely prohibited.[2] 3. *Quo warranto* proceedings shall be instituted against corporations violating sections 5 and 6 of article X of the constitution of Texas, containing the above prohibitions; and if it is found that such violations are taking place, the consolidations shall be perpetually enjoined, and a receiver appointed to carry out the decree of the court.

§ **315. Necessity of Legislative Action.** — As already pointed out, a number of co-adventurers cannot constitute themselves a corporation, by merely joining together and agreeing to become such: it is necessary that they should have the authority of the legislature to assume the franchise of being a corporation.[3] The consolidation of the funds of two incorporated companies, so as to form a single corporation, has, generally speaking, the effect of dissolving both the old corporations, as distinct entities, and of creating a new corporation.[4] This new corporation can no more be created without the sanction of the legislature, than could either of the original constituent corporations.[5] Accordingly, it is held in England that, in the absence of any special power for that purpose in their deeds of settlement, an amalgamation between two joint stock companies is *ultra vires* and invalid, and that the obligations and liabilities arising out of such attempted amalgamation, and assumed by the directors of the purchasing company, cannot be enforced against the shareholders of such company.[6] Where power is given by statute to one rail-

[1] Sayle Civ. Stat. Tex., art. 4296.

[2] *Ibid.*, § 4247.

[3] *Ante*, § 35.

[4] *Post*, § 395, *et seq.*

[5] New York &c. Canal Co. *v.* Fulton Bank, 7 Wend. (N. Y.) 412; Pearce *v.* Madison &c. R. Co., 20 How. (U. S.) 441; Clearwater *v.* Meredith, 1 Wall. (U. S.) 25, 39; State *v.* Bailey, 16 Ind. 46.

[6] Re Era Insurance Soc., 9 Week. Rep. 67; *s. c.* 3 Law Times (N. S.) 314; 30 Law J. Eq. (N. S.) 137; 6 Jur. (N. S.) 1334.

road corporation to *consolidate* with *any other*, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not *named* in the statute.[1] But an agreement cannot be made by which one railway company shall turn over its railway to be worked by another company, unless the latter company possesses, under its governing statute, the power to receive and work it; for the former company cannot delegate or transfer *its* power to work the road to the latter.[2] Where the power to consolidate exists, and the essential steps pointed out by the statute to effect a consolidation have been taken, the question whether the new company has a legal existence, in view of a doubt as to the legal existence of one of the preceding companies, is one which cannot be determined by a proceeding instituted by the stockholders, but only in a proceeding instituted by the State.[3] This is an application of the principle hereafter considered,[4] that, where the circumstances are such that an assumed corporation *might* exist, the fact of its existence will not be tried collaterally, but only in a direct proceeding instituted by the State.

§ **316. Legislature cannot Compel Consolidation of Private Corporations.** — The legislature has no power to compel the consolidation or merger of corporations of a purely *private* character which have assumed no public duties,[5] any more than it can force private persons to become members of such a corporation.[6] Nor can a private corporation, without taking some steps for that purpose, become absorbed or merged in any new corporation, so as to relinquish its former *status*, without taking some *corporate action* which fully authorizes such a result. And

[1] Matter of Prospect Park &c. R. Co., 67 N. Y. 371.

[2] Winch *v.* Birkenhead &c. R. Co., 16 Jur. 1035, 1037. Compare South Yorkshire &c. R. Co. *v.* Great Northern R. Co., 3 De Gex M. & G. 576; State *v.* Consolidation Coal Co., 46 Md. 1. These last two cases affirm the principle that, without legislative authority, a railway company cannot mortgage or sell its property to another company.

[3] Bell *v.* Pennsylvania &c. R. Co., —N.J.Eq. — ; *s. c.* 10 Atl. Rep. 741; 9 Cent. Rep. 138; 2 Rail. & Corp. L. J. 476.

[4] *Post*, § 505.

[5] Mason *v.* Finch, 28 Mich. 282; conceded in Pennsylvania College Cases, 13 Wall. (U. S.) 190, 212.

[6] *Ante*, § 52.

where there is a voluntary association, *e.g.*, a Masonic chapter, in existence, the mere fact that another body becomes incorporated by the same name, does not merge the former in the latter, or create any identity between the two. Such an essential change in the character of an organization, involving such an accession to its membership, cannot be had without some action denoting unanimous consent.[1] Nor would acquiescence, by the voluntary association, in the claims of the corporation that it was identical with it, in the absence of any special circumstances creating an estoppel, operate to extinguish the separate existence of the latter. Nor would acquiescence on the part of its officers bind the members, except to the same extent that their actual agreement to the same end would bind them. An act of a constituent character of this kind cannot be taken by the *officers* merely, or if taken by them must be *ratified* by the members, for they alone could authorize it in the first instance.[2] But where there is a reservation in the constitution of the State, allowing the legislature of the State "to alter, revoke, or annul any charter of incorporation thereafter granted, whenever in their opinion it may be injurious to the citizens, . . . in such manner, however, that no injustice shall be done to the corporators," an act of consolidation, unless plainly unjust to some of the corporators, is not unconstitutional on the ground of impairing the obligation of a contract.[3]

§ **317.—Validation by Curative Statutes.** — If the legislature has power in the first instance to authorize the consolidation of certain corporations, it has the power by a subsequent curative act to validate their consolidation informally or irregularly made.[4]

§ **318. Validation by Legislative Recognition.** — On a principle more fully discussed hereafter[5] an informal or defect-

[1] Mason *v.* Finch, 28 Mich. 282.

[2] *Ibid.*

[3] Pennsylvania College Cases, 13 Wall. (U. S.) 190; affirming *s. c. sub nom.* Houston *v.* Jefferson College, 63 Pa. St. 428, 437.

[4] Mitchell *v.* Deeds, 49 Ill. 416, 419. Compare Racine &c R. Co. *v.* Farmers' &c. Co., 49 Ill. 331. See also Fisher *v.* Evansville &c. R. Co., 7 Ind. 407, 413 (doctrine recognized); *post* § 512.

[5] *Post*, § 512.

ive consolidation may, in like manner, be validated by a subsequent legislative recognition.[1] Thus, a railway corporation was formed by consolidation of several railway corporations, neither of which had any authority to construct its road in the city of Chicago. Subsequently to the consolidation, the legislature passed an act providing that the rate of speed of the consolidated company (using the name which it had taken), "within the limits of that city, should be under the control of the common council," etc. "This amendatory act," said Sheldon, C. J., "is a legislative recognition of this consolidated company, and of the name of the consolidated company, adopted by the articles of consolidation, amounting to legislative ratification of the consolidation which has been effected; and it is also a like recognition of the right of the company to construct a railway within the limits of the city of Chicago." The court accordingly held that the consolidated company could proceed to *condemn land* for its route within that city.[2] This principle has been applied, in a case where it was necessary to the validity of a railway consolidation, that it should be sanctioned by the concurrent legislation of the States of Connecticut and New York. A general law of New York authorized railroad companies, having continuous lines, to unite and form a single corporation. A resolution of the legislature of Connecticut provided that, whenever a company owning a road lying partly within that State should be consolidated with any other company in the State of New York, in pursuance of the laws of that State, the new company should have all the rights, within the State of Connecticut, which were possessed by the old company. With these laws in force, a railway company owning a railway lying wholly within the State of Connecticut, and another company owning a road lying partly within the State of New York and partly within the State of Connecticut, attempted a consolidation. The question having been made as to the validity of its consolidation, on the ground that the roads did not form a continuous line, as required by the laws of New York, the legislature of that State passed an act *recognizing the existence* of the consolidated corporation, and validating and estab-

[1] Mead *v.* New York &c. R. Co., 45 Conn. 199.

[2] McCauley *v.* Columbus &c. R. Co., 83 Ill. 348, 352.

lishing the agreement under which the consolidation had been made. It was held by the Supreme Court of Connecticut that this might be done, and that, when the legal existence of the corporation in the State of New York became thus established, it satisfied the requirements of the Connecticut statute, and the new company became possessed of all the rights in the State of Connecticut which had been possessed by the old company.[1]

§ 319. **Consolidation with Foreign Corporation.** — As already seen, there is no insuperable difficulty in the creation of one corporation by the *concurrent legislation of two States* of the Union,[2] though there are theories that such legislation operates to create *two corporations*, and not one.[3] Pursuing that subject further, we find that the old view was that expressed by Mr. Justice Story at circuit, that, where two corporations, created by the legislation of two States, for the purpose of constructing a public improvement extending across the boundary between such States, are united by new concurrent acts of the legislatures of the two States, by which the stockholders of each are made stockholders in the other, they do not cease to exist as distinct corporations; that the effect of such legislation is a mere union of stocks and interests, but not a merger of powers.[4] This doctrine, it is to be observed, remained that of the United States down to the year 1861,[5] and still inheres in our jurisprudence to a qualified extent.[6]

§ 320. **Remains a Domestic Corporation in Each of the Concurring States.** — From the foregoing observations, we are justified in the conclusion that a corporation created by the concurrent legislation of two or more States, exists in each of such States as a domestic corporation of that State.[7] This conclusion

[1] Mead *v.* New York &c. R. Co., 45 Conn. 199.

[2] *Ante*, § 47.

[3] *Ante*, § 48.

[4] Farnum *v.* Blackstone Canal Corp., 1 Sumn. (U. S.) 46.

[5] Ohio &c. R. Co. *v.* Wheeler, 1 Black (U. S.), 297.

[6] *Ante*, § 47. Rece *v.* Newport News &c. Co., 32 W. Va. 164; 9 S. E. Rep. 212. See also Farmers' Loan & Trust Co. *v.* Trust Co., 21 Abb. N. C. (N. Y.) 104.

[7] So held in Re St. Paul &c. R. Co., 36 Minn. 85. The constitution of Colorado so provides in express terms, thus: "If any railroad, telegraph, express, or other corporation organized under any of the laws of this State shall consolidate by sale or otherwise, with any railroad, tele-

is justified by a comparatively recent decision by the Supreme Court of the United States, in a case where a railroad corporation, chartered in Connecticut, had bought the franchises and properties of a railroad corporation created under the laws of Connecticut and of Rhode Island. The legislature of Rhode Island ratified the sale, and authorized the Connecticut company to exercise the rights thus acquired. It was held that the Connecticut company thus became the successor of the consolidated company, and, as to so much of its road as existed within the State of Rhode Island, a corporation of that State.[1] This is quite in conformity with the observation of the same court, speaking through Mr. Justice Swayne, in a former case: "Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quoad* any property within its territorial jurisdiction."[2] It was reaffirmed by the Supreme Court of Illinois in 1868, that court holding that a contract of consolidation, validated by subsequent legislation, created substantially a new corporation with a new name, but that such corporation, in a legal point of view, remained a distinct corporation in each State. That is to say, there was a Wisconsin corporation of a given name and an Illinois corporation of the same name, although the officers

graph, express or other corporation organized under any laws of any other State or territory, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction over that part of the corporate property, within the limits of this State in all matters which may arise, as if said consolidation had not taken place." Colo. Const. of 1876, art 15, § 14. One of the results of such a doctrine is that the provisions of the law of each of the States whose legislature has concurred in creating the united company, relating to the *service of process* on domestic corporations, applies to such a corporation. Re St. Paul &c. R. Co., 36 Minn. 85. Circumstances of concurrent legislation under which a company organized under the laws of one State, and afterwards consolidated with a company created by another State, might increase its capital stock, in pursuance of the law of the State of its creation: Attorney-General *v.* Boston &c. R. Co., 109 Mass. 99.

[1] Clark *v.* Barnard, 108 U. S. 436.

[2] Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65, 82. That this may be done, seems to have been the view of the same court in the previous case of Ohio &c. R. Co. *v.* Wheeler, 1 Black (U. S.), 297; *ante*, § 47. See also Railway Co. *v.* Whitton, 13 Wall. (U. S.) 270; Railroad Co. *v.* Vance, 96 U. S. 450; Memphis &c. R. Co. *v.* Alabama, 107 U. S. 581.

and stockholders of both corporations were the same.[1] From such a refinement it would seem to follow that, when the persons composing the two corporations acted in Illinois, there was present a domestic corporation and also a foreign corporation, — that is to say, they were there as an Illinois corporation and also as a Wisconsin corporation; and so, conversely, when they acted in Wisconsin. The court, however, went so far as to concede that "the principle that a single corporation cannot be created by the joint legislation of two States, while an irresistible inference, from the established law in regard to corporate bodies, is nevertheless a technical and abstract principle; and when adjoining States authorize consolidations, as in the present instance, and the consolidated lines are placed under a common board with a common name and seal, such board will naturally act as one company; and when their contracts assume that form, the courts must, for the protection of the public, and to enforce good faith, hold, as we have done in this case, that the contract is to be construed as made by the corporation of each State in which the subject-matter of the contract lies: *ut res magis valeat quam pereat*.[2] The court accordingly held that where, after such a consolidation, a *mortgage* had been made in the name conferred upon the corporation by the legislation of each State, by the officers of the corporation as consolidated, upon the line of railroad of the corporation in Illinois, the mortgage would stand as the sole mortgage of the Illinois corporation, and as such be legal and valid.[3] That such a corporation is a corporation created by the laws of each of the concurring States, cannot be denied; and accordingly it has been well reasoned that, for the purpose of *taxation*, a corporation created by the concurrent legislation of the State of Illinois and other States is a company, "incorporated under the laws of this State," within the meaning of a statute of Illinois relating to revenue and taxation.[4] Obviously, the effect of such legislation is not to displace the local law of either of the States in regard to the mode of *condemning land*, or of acquiring the right of way for the use

[1] Racine &c. R. Co. *v.* Farmers' Loan & Trust Co., 49 Ill. 331.

[2] *Ibid.*, p. 352.

[3] *Ibid.*

[4] Ohio &c. R. Co. *v.* Weber, 96 Ill. 443 (following Quincy Bridge Co. *v.* Adams County, 88 Ill. 615).

of the consolidated railway company thus created, nor to import into a particular State a provision of the statutes of the other concurrent States in that regard.[1]

§ 321. Foreign Law not Transferred: Local Law not Displaced. — Such statutes do not transfer the law of one State to the other, except permissively, nor displace the local law, unless otherwise expressly provided. Thus, a statute of Illinois, authorizing the consolidation of a railway company created by the laws of that State, with companies created by the laws of other States, contained the following recital: "And the said corporation shall also possess all the faculties, powers, authorities, immunities, privileges and franchises at any time held by the said Pittsburgh, Ft. Wayne and Chicago Railway Company, or by any of the corporations heretofore consolidated into the said company, or conferred on the said company, the said corporations, or either of them, by an act or law of this State, or of either of the States of Ohio, Indiana or Pennsylvania, and shall have power and capacity to hold and exercise within each and every of the said States, and so far as it may be deemed necessary to the general objects of its business, within any other of the United States, all the faculties, powers, authorities, privileges, and franchises, and all others which may hereafter be conferred upon it by or under any law of this State, or of any of the aforesaid States, and to hold meetings of stockholders and directors, and do all corporate acts or things within any of the aforesaid States, as validly as it might do the same within this State; and may consolidate with any corporation of said other States authorized to hold, maintain and operate the aforesaid railroad." It was held that this statute had no reference to the subject of the acquisition of the right of way by the company to which it related. The court said: "It relates purely, as the language unmistakably shows, to the faculties, powers, authorities, privileges and franchises which may be deemed necessary to the general objects of its business within any other of the United States. It relates to the corporation itself, and is designed to make it a unit in each and all of the States in which its line is located; but it does not assume to affect the local law in regard to the mode of acquiring title to the *right of way*. It has the same power and capacity to take and hold right of way in this State that it does in the other States; but the mode of acquiring right of way is obviously very different from the capacity to take and hold it. The control of streets, and the mode of regulating their use, and the mode of executing and acknowledging deeds and effecting *condemnations* are matters of local law, affected, to some ex-

[1] Pittsburgh &c. R. Co. *v.* Reich, 101 Ill. 157.

tent, by local constitutions, which it would doubtless be impossible to place under precisely the same law in each of these four States. At all events, we feel quite confident no such attempt has been here made."[1]

§ 322. **With what Powers and Liabilities.** — In respect of the *financial powers* possessed by the consolidated company, it can be safely said that it succeeds to whatever power of issuing bonds and mortgaging its property and franchises was possessed by *both* of the preceding companies under their governing statutes.[2] But whether, in case the governing statute of one of the companies conferred upon it larger powers than that conferred by its governing statute upon the other, the united company would succeed to the larger class of powers, may be a question of difficulty. Where the act of consolidation passed by the legislature of each of the concurring States provided that the holders of the stocks of the two companies should, when consolidated, hold, possess and enjoy, all the property, rights and privileges and exercise all the powers granted to and vested in the companies, or either of them, by that law or any other law or laws of that State, or of the concurring State, — it was held that the purpose of the two provisions was to vest in the new company the rights and privileges which the original companies had previously possessed under their separate charters, — the rights and privileges which *one* of the original companies had enjoyed in the State of its creation, and the rights and privileges which *the other* had in like manner enjoyed in the State of its creation, — and not to transfer to either State or to enforce therein the legislation of the other. The new company, after the consolidation, stood in each State as the original company had previously stood in that State, invested with the same rights, and subject to the same liabilities.[3] As elsewhere seen,[4] specific liens upon the property of a railway company follow the property into the hands of the new company after the consolidation. The effect of the consolidation is not, unless otherwise provided in the governing statute, to enlarge the rights of the lien-holders, and

[1] Pittsburgh &c. R. Co. *v.* Reich, 101 Ill. 157, 174.

[2] Mead *v.* New York &c. R. Co., 45 Conn. 199, 221.

[3] Delaware Railroad Tax, 18 Wall. (U. S.) 206.

[4] *Post*, § 365, *et seq.*

it is not competent for the legislature to diminish them.[1] The lien of a mortgage upon the road-way of one of the precedent companies is therefore enforcible by a sale of such road-way, although it may operate to sell a *portion* of a continuous line of railway. Where the consolidation has assumed the form of a purchase by the absorbing company of the line of the absorbed railway, which line is covered by a mortgage, the purchasing company will be estopped from setting up the defense that the effect of such a sale will be to sever their line.[2]

§ 323. Jurisdiction not Parted with or Transferred. — Where, in such a case, the State, the railway of whose corporation is absorbed, under the permission granted by its statute, by the foreign corporation, — grants, by the terms of such statute, to the foreign State, no jurisdiction over the property which it thus allows to be absorbed by the foreign corporation, an action cannot be maintained in such foreign State to foreclose a mortgage existing prior to the consolidation, upon the property thus ceded to the foreign corporation. It follows that the existence in the foreign State, of a foreclosure suit, in respect of such domestic property, is no bar to the bringing and prosecution of such an action in the State which has authorized the absorption. This ruling proceeds upon the principle that a State will not be considered to have parted with jurisdictional power without the clearest expression of the fact.[3]

§ 324. Selling out to a Foreign Corporation and Taking its Shares in Payment. — Consolidations have often taken the form of a *purchase* and *sale*, — that is, a purchase by one corporation of all the shares of stock of another corporation, payment being made in the shares of the purchasing corporation.[4] Of course,

[1] Eaton &c. R. Co. *v.* Hunt, 20 Ind. 457, 464, per Perkins, J.; Gantly *v.* Ewing, 3 How. (U. S.) 707; Scobey *v.* Gibson, 17 Ind. 572.

[2] For "it will not do for the company to say that six miles of road could not be sold separately, they having purchased it after it had been mortgaged separately, subject to the mortgage." Eaton &c. R. Co. *v.* Hunt, 20 Ind. 457, 464.

[3] Eaton &c. R. Co. *v.* Hunt, 20 Ind. 457, 466; citing to the principle just stated, Newcastle &c. R. Co. *v.* Peru &c. R. Co., 3 Ind. 464; Johns *v.* State, 19 Ind. 421.

[4] Such was the scheme in the case of Lauman *v.* Lebanon Valley R. Co., 30 Pa. St. 46.

it is competent for the legislature to authorize one corporation to become consolidated with a *foreign* corporation, in such a manner as to place the control of the consolidated stock in the board of directors of the foreign company.[1] But this cannot be done without legislative authorization; and the statute authorizing it ought to be *express*. Such a power will not be allowed to arise upon a doubtful implication.[2]

§ **325. Illustrations.**—Accordingly, it has been held that a corporation organized under the laws of New York has no power to transfer all its property to a foreign corporation carrying on the same business, taking in payment the stock of the foreign company, and thus terminating its own existence. Nor can a majority of the stockholders bind a dissenting minority by a scheme of this kind, which operates to dissolve the domestic corporation and to transfer its property to the foreign one, so as to escape that scrutiny into its affairs which is enjoined by the laws of New York. In such a case a dissenting stockholder may maintain a suit in equity to have the transaction enjoined and to have the corporation wound up. Said the court: "He became a stockholder under the security of the New York law, and, when that is taken from him, at least he should have the property of his corporation applied to the payment of its debts, and the surplus, if any, divided among the stockholders." [3] - - - - Of course, what a *majority* of the stockholders cannot do, the *trustees* cannot do. Accordingly, on the dissolution of a joint-stock corporation, it is the duty of the trustees to convert the assets into money, and to distribute the proceeds, first to the creditors, and then to the stockholders. They have no right to exchange the assets, or any portion of them, for the stock of any other corporation, without the consent of *all* the stockholders; and a stockholder, not consenting to such exchange, may recover of the trustees the value of his stock thus wrongfully disposed of, on the theory of a *conversion*.[4]

[1] Racine &c. R. Co. *v.* Farmers' &c. Co., 49 Ill. 331.

[2] Thus, where a statute authorizes railroad companies to *lease* their properties, but does not in terms authorize such a company to lease its properties to a railroad company created by the legislature of another State, such a power will be held not to exist, on the settled rule of construction, in respect of legislative grants to corporations, that what is not clearly granted is withheld, and that any ambiguity in the terms of the grant must operate against the corporation and in favor of the public. Or, as it has been expressed, that to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. Black *v.* Delaware &c. R. Co., 24 N. J. Eq. 456.

[3] Taylor *v.* Earle, 8 Hun (N. Y), 1.

[4] Frothingham *v.* Barney, 6 Hun (N. Y.), 366. That a shareholder has

§ 326. Power to Consolidate a Contract Right and Inviolable. — The power given to a railroad company, by the statute of its creation, to form a union by consolidation with other companies, has been said to be a right in the nature of a contract, when the statute is accepted and acted upon by the corporation, which cannot be subsequently withdrawn or substantially impaired by the State, in consequence of the prohibition of the constitution of the United States.[1]

§ 327. What Steps Necessary to Effect a Consolidation. — It follows from what has just been said that a corporation, *e.g.*, a railway company, by "associating, allying and connecting itself" with another, does not thereby become equitably "amalgamated" with it; [2] though two such companies may form, by agreement, such *traffic arrangements* as to operate their roads as a *continuous line*, and render either company liable to a passenger for the loss of his baggage,[3] or such as to render them *jointly liable* to shippers.[4] As in the case of the creation of a corporation under a general law,[5] where two or more companies undertake to consolidate, the essential steps pointed out by the statute, in so far as they constitute *conditions precedent*, must be taken before the consolidation is effectual and the new company comes into existence. Thus, if the governing statute requires a *certificate of consolidation* to be filed with the Secretary of State, until this is done the new company does not exist.[6] On the

a right to have the contract, embodied in the articles of association, *performed* by the trustees according to its terms, and that he has a right to the aid of a court of *equity* to compel them to perform it, — as for instance to compel them to wind up the company, dispose of its property and distribute its proceeds, as provided in the articles, although some different scheme might be more profitable and more beneficial to all the shareholders, — was held in Mann *v.* Butler, 2 Barb. Ch. (N. Y.) 362. That stockholders cannot be *forced* into relations with new corporations against their consent, see Blatchford *v.* Ross, 54 Barb. (N. Y.) 42. And compare Hartford &c. R. Co. *v.* Crosswell, 5 Hill (N. Y.), 383; *ante*, § 74; *post*, § 343.

[1] Zimmer *v.* State, 30 Ark. 677, 680, per Harrison, J.

[2] Shrewsbury &c. R. Co. *v.* Stour Valley Co., 21 Eng. L. & Eq. 628; 2 De Gex, M. & G. 866.

[3] Hart *v.* Rensselaer &c. R. Co., 8 N. Y. 37; Stratton *v.* New York &c. R. Co., 2 E. D. Smith (N. Y.) 184; Lee Lin *v.* Terre Haute &c. R. Co., 10 Mo. App. 125, and cases there cited.

[4] Wyman *v.* Railroad Co., 4 Mo. App. 95.

[5] *Ante*, § 226.

[6] Commonwealth *v.* Atlantic &c. R. Co., 53 Pa. St. 9. Peninsular R. Co. *v.* Tharp, 28 Mich. 506.

other hand, as in the case of an original incorporation,[1] the filing of such an instrument is usually sufficient to constitute the consolidated company a legal corporation within the state.[2] But when it is proved that a certificate of consolidation was deposited with the Secretary of State, as provided by law, the *presumption* is that the secretary filed the same of record and that it remains of record, and a *mandamus* will, if necessary, issue to the Secretary of State to add the *date* of filing, or to do any other ministerial act in the premises required by the governing statute.[3] Moreover, as in the case of an original incorporation,[4] unless the certificate in its recitals complies in substance with the statute, there will be no incorporation. It was so held under a statute of Ohio, where the certificate failed to state the *residence of the directors* of the new company.[5] Outside of the making and filing of the certificate, the statute may impose conditions precedent to the existence of the consolidated company, as, under one statute,[6] the condition of the *election of a board* of directors of the new company, until which the new company does not acquire the rights and franchises of the precedent companies.[7] Again, while in the case of an original incorporation,[8] the *filing of a duplicate*, or copy of the certificate of incorporation, with the Secretary of State, is generally not regarded as a condition precedent to the existence of the corporation, — yet, under a statute of Michigan, it has been held such in respect of the filing of a duplicate of the agreement of consolidation between railway companies.[9]

§ 328. Distinction between Consolidation and Agreement to Consolidate. — Two things are of course necessary to the consolidation of two or more corporations: 1. An enabling statute. 2. An agreement between the consolidating companies that they will consoli-

[1] *Ante*, § 220, *et seq.*

[2] Commonwealth *v.* Atlantic &c. R. Co., 53 Pa. St. 9.

[3] Com. *v.* Atlantic &c. R. Co., 53 Pa. St. 9.

[4] *Ante*, § 221.

[5] State *v.* Vanderbilt, 37 Ohio St. 590, 645. The court cited: Atlantic &c. R. Co. *v.* Sullivant, 5 Oh. St. 276; State *v.* Lee, 21 Oh. St. 662; State *v.* Central &c. Asso., 29 Oh. St. 399; People *v.* Chambers, 42 Cal. 201.

[6] Comp. Laws Mich. 1857, § 1996.

[7] Mansfield &c. R. Co. *v.* Drinker, 30 Mich. 124.

[8] *Ante*, § 240.

[9] Mansfield &c. R. Co. *v.* Drinker, *supra.*

date. In addition to this, there must follow the other *steps* pointed out by the statute to make the consolidation effectual. An agreement to consolidate *at a future time* is, of course, no consolidation, and will not amalgamate the two companies under any circumstances until the time arrives.[1]

§ 329. Agreements which do not Amount to a Consolidation. — A mere alliance, or association, or *traffic connection* between two railroad companies, does not have the effect of consolidating them, even in the view of a court of equity.[2] But where, under such an agreement, one of the companies has acquired rights against the other in respect to the use of its properties, as the right to the *joint use* of one of its *stations*, a court of equity will interfere in its behalf to protect these rights, provided the occasion is grave and the complaining company is otherwise without remedy. In such a case, the court may direct a *partition* of the station, and appoint a *receiver*, if necessary. But where provisions exist for the settlement of disputes on such subjects by *arbitration*, the court will withhold its interposition until the remedy thus provided for has been resorted to.[3]

§ 330. By One Company Purchasing the Capital Stock of the Other Company. — Statutes authorizing the consolidation of railway companies have sometimes taken the form of empowering one company to purchase the capital stock of the other company. Such was held to be the effect of certain special statutes of New Jersey. One of these authorized certain railroad companies to consolidate their capital stock. Another authorized one of the companies, which had then mortgaged its after-acquired property, to purchase the stock of the other company, in lieu of a consolidation of its own stock with the capital stock of the latter. The purchase and delivery of the stock were actually made, for the purpose of consolidation. An actual consolidation took place, and was completely recognized by the parties in interest; and the company whose stock had been sold, thereafter ceased to exist, except as a mere matter of form, and

[1] Shrewsbury &c. R. Co. *v.* Stour Valley R. Co., 21 Eng. L. & Eq. 628; 2 De Gex, M. & G. 866.

[2] Shrewsbury &c. R. Co. *v.* Stour Valley R. Co., 21 Eng. L. & Eq. 628; 2 De Gex, M. & G. 866.

[3] *Ibid.* That contracts between different companies for an amalgamation are in England recognized and enforced in equity, see Mozley *v.* Alston, 1 Phil. Ch. 790.

for the benefit of the other company. It was held that the sale and delivery of the capital stock of the absorbed company was a consolidation, in accordance with the provisions of the acts in question; that the covenant for *further assurance* as to such after-acquired property contained in the mortgage, would be *specifically enforced;* and that equity would in such a case supply all the formalities.[1] Such also was the effect of the statute under consideration in an important case in Indiana, where the legislature of that State authorized the consolidation of a railway company of that State with a similar company of the State of Ohio. The Indiana statute provided that "the corporate name, franchises, rights, immunities and organization, of the Eaton and Hamilton Railway Company [the Ohio Company] shall be preserved and remain intact;" and that "the name and organization of said Richmond and Miami Railroad Company shall cease;" and that all the property, rights, etc., of the Richmond and Miami Railroad Company, "are hereby conveyed to" "the said Eaton and Hamilton Railroad." "It thus appears," said Perkins, J., "that, by the act of consolidation, the exact existence of the Ohio Company is *continued*, while that of the Indiana company is *extinguished*, after all its property is transferred to the Ohio Company. It comes to this: the Eaton and Hamilton Company *bought out* the Richmond and Miami corporation, and now owns a line of railroad, six miles of the western end of which is in the State of Indiana, and which that corporation, though a foreign one, thus owns and operates under the authority of the law of Indiana."[2]

§ 331. Railroad Companies Combining to Purchase Another Road.— Where a railroad company, by reason of a lack of proper running arrangements with other roads, is unable to pay its expenses, and it appears unavoidable that it must go to sale, either under a mortgage or under a judgment obtained by its general creditors, courts of equity see nothing wrong or fraudulent in connecting companies combining and forming an association for purchasing it, and for operating it, under such

[1] Williamson v. New Jersey Southern R. Co., 26 N. J. Eq. 398.

[2] Eaton &c. R. Co. v. Hunt, 20 Ind. 457, 462.

arrangements as will give it through connections, and enable it better to serve the public, and afford profit to its owners.[1]

§ 332. **When Deemed Fraudulent in Law.** — The rule of equity being that the assets of a corporation are a *trust fund* for its creditors, and it being the settled policy of these courts to guard sedulously this fund, and to annul all arrangements and devices whereby it is frittered away,[2] they will scrutinize with jealousy any arrangement by which the assets of one corporation are turned over to and swallowed up by another, leaving the debts of the former unpaid and unsecured. Such arrangements are justly characterized as against public policy, and as frauds upon the law. The *motives* with which they have been made will not be regarded as a question of much concern; the *result* will be justly looked to, for the purpose of determining whether the transaction shall be permitted to stand or fall. Care must, of course, be taken to discriminate between arrangements of this kind done by the directors of the selling corporations, in breach of their trust and in fraud of the rights of its creditors, and *bona fide* amalgamations of corporations, accomplished in pursuance of law, through the proper corporate action, in which case the assets of neither of the amalgamating corporations are withdrawn from its creditors, but the amalgamated corporation succeeds to the liabilities of both of the corporations by whose union it was created, and holds the assets of both, in trust, for the purpose of discharging those liabilities.[3] Equity will annul

[1] Kitchen *v.* St. Louis &c. R. Co., 69 Mo. 224, 256; *ante*, § 271.

[2] Upton *v.* Tribilcock, 91 U. S. 47.

[3] One court has held that a corporation which takes, as owner, all the property and assets of an old corporation (which is dissolved without providing for all its debts) must pay the debts of the old corporation, at least to the amount of the assets converted. Brum *v.* Merchants Mut. Ins. Co., 16 Fed. Rep. 140, Pardee, J. Another court has held that, where a corporation, after contracting debts, transfers, without consideration, all of its property to another corporation having notice of the indebtedness, equity has jurisdiction of a suit to enforce the indebtedness against the latter corporation, although no *judgment at law* has been obtained against the former one, and that the president of the former corporation is not properly a party to such suit. Hibernia Ins. Co. *v.* St. Louis Transportation Co., 3 McCrary (U. S.), 368. The court examines Garrison *v.* Memphis Ins. Co., 19 How. (U. S.) 312; Case *v.* Beauregard, 99 U. S. 119; *s. c.* 101 U. S. 688. A construction company agreed to build a railroad for a Georgia corporation. As security for the out-

any scheme by which *one* of two companies, pending negotiations for a consolidation, commits a *fraud* upon the shareholders of *the other*. Thus, while negotiations were pending between two gas companies for their consolidation, upon a certain basis of indebtedness, one of the companies passed a resolution, without the knowledge of the other, declaring a scrip dividend of ten per cent. on the amount of their capital stock, with interest, payable at the option of the company, thus increasing their indebtedness to that amount. Certificates of indebtedness were issued in accordance with the resolution. Consolidation was effected between the companies without any knowledge of the other company as to such resolution and such increased indebtedness. It was held on a bill for that purpose, that the scrip should be dedeclared void, and the company issuing it restrained from recognizing the scrip as a valid obligation, and from permitting its transfer. The certificates should have put the purchasers upon inquiry, and they are not, therefore, within the rule applicable to negotiable paper. Though purchased without knowledge of their character on the part of the purchaser, and without inquiry, they might be ordered to be delivered up to be cancelled.[1] Consolidation arrangements will be set aside in equity where one director is a director of both companies. Thus, it has been held that a contract by which the bondholders of an insolvent railroad company agree to foreclose a mortgage on its property, to

lay to be incurred, the construction company received most of the stock, bonds and assets, of the railroad corporation. Then without beginning the construction, the construction company transferred the stock to the managers of another railroad corporation whose road competed with the projected road of the first named corporation. The money used by these managers to purchase the stock was the money of the corporation which they controlled. A., B. and C. each lent money to the manager of the construction company to enable that company to carry out its contract to build the road, repayment to be made from the profits of the undertaking. It was held, that A., B. and C. could maintain a single suit to prevent the consummation of these transactions, and to charge the second named railroad corporation as trustee of the assets of the construction company (which was insolvent), the transactions being a fraud on plaintiffs, besides being within the inhibition of the provision of the Georgia constitution against the purchase by one corporation of the shares of another corporation, and against agreements operating to defeat or lessen competition or to encourage monopoly. Langdon *v.* Branch, 37 Fed. Rep. 449; 5 Rail. & Corp. L. J. 107.

[1] Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196.

buy the property at the mortgage sale, and to transfer it to another company of which one of the bondholders of the insolvent road is a director, in consideration of the transfer of certain bonds of the proposed new company, — is not such a contract as is sanctioned by the New York statute, above quoted,[1] relating to the reorganization of existing railroads, but is void as against public policy, on the ground that the law cannot accurately measure the influence of the single director who acts in the double capacity of *buyer* and *seller*. The court say: "The value of the rule of equity to which we have adverted, lies, to a great extent, in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of the trustees, vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative."[2] The circumstances surrounding every case of amalgamation are so multiplied and various, the ramifications of fraud are so extensive, and its devices so subtle, — that it would be impossible to indicate, by any general statement, what amalgamations are to be deemed lawful and proper, and what fraudulent and unlawful. Each case must, obviously, be judged by its own facts; and where these facts clearly appear, experienced and upright judges will, in many cases, come to opposite conclusions respecting them.

§ **333. Illustration.**— A transfer of the assets of one *life insurance company* to another, the selling company, and probably both, being at the time insolvent, through the following method, and under the following circumstances, was held *fraudulent in law*, if not fraudulent in fact: — The Life Association of America purchased of the St. Louis Life Insurance Company all its stock notes, together with the mortgages and collaterals given as security for the same, paying for them by its own draft. This draft was afterwards subdivided into three others, aggregating in amount the same as the first, one being for $900,000, and the other two for smaller amounts. These two latter

[1] *Ante*, § 258.

[2] Munson *v.* Syracuse &c. R. Co., 103 N. Y. 58, 74; *s. c.* 29 Am. & Eng. R. Cas. 377, 382, opinion by Andrews, J.

were subsequently paid. With the stock notes and securities so obtained and a little cash, the Life Association, by the active assistance of the officers and directors of the St. Louis Life Insurance Company, purchased 9,763 of the 10,000 shares constituting the capital stock of that corporation, and had the same transferred to itself. By this transfer the offices of the directors of the St. Louis Life Insurance Company became vacant, and the Life Association caused its own directors to be elected in their places. Using the power thus acquired, the Life Association then procured an amendment to be made to the charter of the St. Louis Life Insurance Company by which the retirement of a portion of the capital stock of the latter was authorized. The Life Association then presented to the St. Louis Life Insurance Company 9,000 of its 9,763 shares for redemption, and, by order of the new board of directors, the treasurer of the St. Louis Life Insurance Company redeemed the same, by *returning* to the Life Association the above mentioned draft for $900,000.[1] It was also held that a *receiver* of the selling company might maintain a suit in equity against the representative of the purchasing company, for the recovery of the value of the assets thus transferred; that, on the head of fraud, and for the purpose of preventing a multiplicity of suits, *equity* has *jurisdiction* of such an action, although the only decree rendered will be for the recovery of money; and that the *measure of damages* in the particular case was the face value of the draft for $900,000, together with interest, which draft had been delivered by the purchasing company to the selling company, and which the directors of the purchasing company, after they had caused themselves to be elected directors of the selling company, had ordered not to be collected.[2]

§ **334. Contract of Amalgamation an Entirety.** — The contract by which two companies amalgamate or consolidate, or by which one company transfers its assets and liabilities to another company must, obviously, as a general rule, stand or fall as an entire thing. When, therefore, an insurance company, being in difficulties, transferred its assets and liabilities to another insurance company, on a contract that the shares of stock of the selling company should be taken up by shares of stock of equal par value of the purchasing company, issued to the shareholders of the selling company, and that the new shares so issued should be redeemable at par by the purchasing company within a year, at the option of the shareholders, a receiver of the selling company

[1] Alexander *v.* Relfe, 74 Mo. 495.

[2] *Ibid.*

could not, after the validity of the contract of transfer had been established in another proceeding, recover of one of such shareholders the redemption money which he had thus received for his shares from the purchasing company.[1]

§ 335. Cannot be Rescinded without Restoring Consideration. — Where two corporations have become consolidated, through an arrangement under which a portion of the shares of stock of the purchasing company was transferred to a shareholder of the selling company, in lieu of his interest as a shareholder in the selling company, neither the purchasing company nor a shareholder therein, can claim, in a court of equity, a cancellation of the shares so issued by the selling company, without offering to return the consideration which the purchasing company received for them.[2]

§ 336. Obligation of the Committee to Account for Profits.— If the committee to whom the matter of the arrangements for the amalgamation sell the shares of the intended consolidated company, at a premium, they will of course be held to the obligation of accounting to the company for the premium, on principles hereafter stated and discussed.[3]

§ 337. Decisions under Special Statutes. — The statute of *New Hampshire*, regulating the compensation to be paid by one railroad company for the use of the roadway of another[4] has been held not to *repeal*, by implication, a statute restraining the consolidation of rival railroad lines, by arrangements giving to one the management of both, and thus destroying *competition*. Such an effect, it was reasoned, might be produced, not only by a *lease*, but by an agreement to divide the income of both roads.[5] - - - - The *Pennsylvania* act of 1861,[6] which authorized any railroad company chartered by the commonwealth, to consolidate with any other railroad company so chartered, has been held to have no application to *street passenger railway* companies.[7] - - - -

[1] Bent *v.* Hart, 73 Mo. 641; affirming *s. c.* 10 Mo. App. 143, Sherwood, C. J., dissented.

[2] Buford *v.* Keokuk &c. Packet Co., 69 Mo. 611; affg. *s. c.* 3 Mo. App. 159.

[3] *Post*, § 457. Compare Rossmore *v.* Mowatt, 15 Jur. (N. S.) 238.

[4] Gen. Stats. N. H., ch. 150, § 10.

[5] Currier *v.* Concord R. Corp., 48 N. H. 321.

[6] Pub. Laws Pa. 1861, 702.

[7] Philadelphia *v.* Thirteenth &c. R. Co., 1 Leg. Gaz. Rep. (Pa.) 163.

The consolidation between the Central Railroad and Banking Company of *Georgia* and the Macon and Western Railroad Company, under the name and charter of the former company, created a *new corporation* for the specified purposes therein declared, and, as no time was specified in the act for its continuance, it was held that it would not *expire*, under the general law of the State, for thirty years.[1] The fact that all the rights, privileges, etc., of the Central Railroad and Banking Company, as specified in its charter granted in the year 1835, were conferred upon the new company, by general reference thereto in the act of August, 1872, did not cause such a grant to operate as if made in the year 1835, but the legal effect was the same as if such rights, etc., had been specifically enumerated in the latter act; and the right of withdrawal or repeal was therefore reserved to the State under section 1682 of the code, in view of the provisions of which the new charter was accepted, and which entered into it and became a part of the contract between the new company and the State.[2] - - - - Of course, a statute providing for a consolidation, and containing certain provisions, and prescribing certain things to be done by the new company, cannot become operative unless a consolidation in fact takes place.[3] - - - - Under a statute of *Ohio*,[4] providing that railroad companies can consolidate only when they are "so constructed as to admit the passage of burthen or passenger cars over any two or more of such roads continuously, without break or interruption," two companies, whose roads are *nearly parallel* and connected only by leased roads, cannot be so consolidated.[5] The statute intends to limit the power of consolidation to railroads which may connect so as to *extend* the line of either. - - - - Where the roads of two companies are not parallel they may be deemed to "unite and form a continuous line," within Ohio Rev. Stat., § 3380, authorizing consolidation, though they are connected, not directly, but by the tracks of a "union" company organized by them and by other companies to secure a union depot and terminal facilities.[6] - - - Under the consolidation act (Ohio Rev. Stat., §§ 3379–3388), the consolidating companies may agree upon the number and amount of shares of the proposed consolidation company; may classify such new stock into "common" and "preferred," and may issue a greater or less number of shares than that of the aggregate of the constituent companies to secure

[1] Central R. &c. Co. *v.* State, 54 Ga. 401.

[2] *Ibid.*

[3] Gibbes *v.* Greenville &c. R. Co., 13 S. C. 228.

[4] Rev. Stats. Ohio, § 3379.

[5] State *v.* Vanderbilt, 37 Oh. St. 590. As to when consolidating railroads are to be regarded as *connected* and *continuous lines*, see Black *v.* Delaware &c. Canal Co., 22 N. J. Eq. 130, 202, and cases cited.

[6] Burke *v.* Cleveland &c. R. Co., 22 Week L. Bul. (Oh.) 11.

a just and equitable division of property between the shareholders of the constituent companies.[1] - - - - The franchises of one company, which expire by limitation at a definite time, cannot be *revived* and extended by incorporating such company with another company, whose franchises extend to a later date, under a general statute authorizing consolidations; nor can a corporation whose franchise has expired by limitation, be *revived* by a pretended consolidation with another like corporation, whose franchises have not expired.[2] A statute of *Louisiana*[3] authorizing three-fifths of the stockholders of two gas-light companies to effect a consolidation, — did not authorize them to place stock of non-participating stockholders on a footing inferior to their own, or to transfer their right to third persons without their consent.[4]

[1] *Ibid.*

[2] Thus, the *Louisiana* law of 1874, for consolidation of corporations, does not authorize a company incorporated in 1870, with the exclusive franchise of making and vending *gas* in New Orleans for fifty years, beginning April 2, 1875, to be consolidated with one incorporated in 1835, with an exclusive franchise of making and vending gas in New Orleans until April 1, 1875, when its charter expired. New Orleans Gas-Light Co. *v.* Louisiana Light &c. Co., 4 Woods (U. S.), 90.

[3] La. Acts of 1874, No. 157.

[4] Fee *v.* New Orleans Gas-Light Company, 35 La. An. 413. Other decisions in particular jurisdictions, construing particular statutes of consolidation, with reference to various questions, can only be referred to. As to the consolidation between the Kansas Pacific and Union Pacific railroad companies, in respect of its effect upon the right of the United States to retain a part of the earnings of that part of the Union Pacific road belonging to the Kansas Pacific: Union Pacific R. Co. *v.* United States, 16 Ct. of Cl. (U. S.) 353. That the consolidation of the Southwestern and Muskogee railroad companies of Georgia was entered into in view of the provisions of § 1682 of the code of that State, reserving to the State the right to withdraw the franchise: Southwestern R. Co. *v.* State, 54 Ga. 401. Effect of the Massachusetts statute of 1872, chapter 180, permitting the lease of a railroad under certain circumstances, — that it repeals *pro tanto* the Mass. Laws of 1867, ch. 298, and of 1871, ch. 389, prohibiting such leases and regulating consolidations, etc.: Peters *v.* Boston &c. R. Co., 114 Mass. 127. Elaborate decision of the chancery court of New Jersey, in a case where the opposing parties were represented by counsel of great ability, and where the printed arguments consumed some 240 pages, construing the New Jersey act of March 17, 1870, consolidating the Delaware and Raritan Canal Co., the Camden & Amboy Railroad & Transportation Co., and the New Jersey Railroad & Transportation Co., — with reference to a variety of questions, including the power of the united companies to lease their properties to the Pennsylvania Railroad Company, a corporation of another State, etc.: Black *v.* Delaware &c. Canal Co., 22 N. J. Eq. 130, 393. Validity of the consolidation of Atlantic & Pacific Railroad Co. of Missouri with South Pacific R. Co. of the same State under a particular enabling act: Atlantic &c. R. Co. *v.* St. Louis, 66 Mo.

Article II. Effect Upon Shareholders.

§ 343. Effect of Consolidation upon the Rights of Dissenting Shareholders. — As elsewhere seen, the consolidation of

228. Requisites and sufficiency of proceedings under statutes of Michigan to effect the consolidation of railroad companies: Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247. Construction of Alabama act of 1848, incorporating Alabama and Tennessee River R. Company and that of 1866, authorizing the company to extend its road with reference to an agreement of consolidation made in anticipation of special enabling legislation by the State of Georgia, — holding that the Georgia companies were dissolved and merged into the Alabama company, which continued its existence, but with enlarged powers and extended franchises, etc.: Meyer *v.* Johnston, 53 Ala. 237; Meyer *v.* Johnston, 64 Ala. 603. As to the respective rights of *stockholders* in two corporations which have become consolidated: Bishop *v.* Brainerd, 28 Conn. 289. Validity of a payment by one company to another to influence consolidation where legislative consent doubtful: Gould *v.* Seney, 5 N. Y. Supp. 928; 6 R. & Corp. L. J. 143. Division of stock of new company when not prohibited by § 309 of Cal. Civil Code: Cole *v.* Lilenthal, 81 Cal. 378; *s. c.* 20 Pac. Rep. 401. *New York* statute, N. Y. Laws 1875, c. 108, providing that "in any case where two or more railroad companies shall have been or shall hereafter be organized under the general laws of the State the whole of whose lines, as located by them, respectively, shall form one continuous and connecting line of

one corporation with another is a *change* of such a *fundamental* character that, unless the change is authorized by the original statute creating one of the consolidating corporations, the fact of consolidation will operate to release any dissenting shareholder.[1] Having embarked his money in one venture, he cannot, without his consent, be compelled to transfer it to another venture. The general rule, therefore, is that a consolidation can only take place with the *unanimous consent* of the *shareholders* of both companies.[2] As already seen,[3] statutes exist providing that agreements of consolidation may be ratified by a majority, or two-thirds, or three-fourths of the shareholders of each company. Where these statutes exist at the time of the shareholder's subscription, or where they become operative upon it in consequence of a legislative right — reserved in the constitution of the State or in a general statute at the time of the subscription, — they establish an exception to the above stated rule. Another exception exists where there is a statute, in like manner operative notwithstanding the contract of subscription, providing for the purchase, at a sale or appraisement, of the shares of the dissenting member. But in the absence of a statute thus entering into, or qualifying or overriding the contract of subscription, any rule short of that first stated allows the agreement of consolidation to impair the obligation of the contract between the dissenting stockholder and the corporation which he originally joined. The stockholders in the old corporation, who do not enter into the new corporation, are therefore, in the absence

road, the said companies may consolidate their lines of road, stock, franchises, and property, according to the existing laws of this State relating to the consolidation of railroad companies," is inconsistent with the provisions of N. Y. Laws 1869, c. 917, which exempt street railroads from the power it confers to consolidate, and it therefore repeals by implication such former provisions. Re Washington Street &c. R. Co., 115 N. Y. 442; 22 Northeast. Rep. 356; 26 N. Y. St. Rep. 504.

[1] *Ante*, § 75.

[2] Kean *v.* Johnson, 9 N. J. Eq. 401; Chapman *v.* Mad River &c. R. Co., 6 Oh. St. 119; Fisher *v.* Evansville &c. R. Co., 7 Ind. 407; Blatchford *v.* Ross, 54 Barb. (N. Y.) 42; *s. c.* 5 Abb. Pr. (N. s.) (N. Y.) 434; 37 How. Pr. (N. Y.) 100; McVicker *v.* Ross, 55 Barb. (N. Y.) 247; McCray *v.* Junction R. Co., 9 Ind. 358; Illinois &c. R. Co. *v.* Cook, 29 Ill. 237; Botts *v.* Simsonville &c. Turnpike Co., 88 Ky. 54; *s. c.* 10 S. W. Rep. 134; Mowrey *v.* Indianapolis &c. R. Co., 4 Biss. (U. S.) 78; Nathan *v.* Tompkins, 82 Ala. 437; Indianola R. Co. *v.* Fryer, 56 Tex. 96, 117.

[3] *Ante*, §§ 305–313.

of such statutes, entitled to withdraw from the venture and cease to be liable on their stock subscriptions.[1] But, in the absence of a statute existing at the time of his subscription, providing for the consolidation upon a vote of less than the whole, or for the purchase of the interests of dissenting stockholders in the event of a consolidation, it is conceived that he will neither be bound to consent to the consolidation nor to surrender his interest in his original corporation. In such cases *enabling acts*, authorizing the consolidation of existing corporations, or the creation of a new corporation by a union of the members of existing corporations, are construed as *permissive* merely, and not as binding a dissenting member. Such a member does not become a member of the new corporation, although the act may be duly accepted by a majority of the members of each of the old ones.[2] Nor without such a reservation of power as that already stated, can the legislature confer upon existing corporations the power to consolidate their stock and form a new corporation, without the unanimous consent of their stockholders, because so to do would impair the obligation of the contract subsisting between the stockholders of the precedent corporations. In such an event a dissenting stockholder would not be bound.[3] In so holding, it was said by the court, speaking through Mr. Justice Davis: "When any person takes stock in a railroad corporation, he has entered into a contract with the company, that his interests shall be subject to the direction and control of the proper authorities of the corporation, to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribed should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsi-

[1] McCray *v.* Junction R. Co., 9 Ind. 358; State *v.* Bailey, 16 Ind. 46; Clearwater *v.* Meredith, 1 Wall. (U. S.) 25, 49.

[2] Hamilton Mut. Ins. Co. *v.* Hobart, 2 Gray (Mass.), 543. Under the Ohio act of 1856, providing for the consolidation of railroad corporations (53 Ohio Laws, 143), the corporations which are parties to an agreement to consolidate continue in the full enjoyment of their powers and franchises respectively, and may accept subscriptions to their capital stock at any time before the consolidation is consummated by filing the agreement of consolidation with the Secretary of State. Mansfield &c. R. Co. *v.* Brown, 26 Oh. St. 223.

[3] Clearwater *v.* Meredith, 1 Wall. (U. S.) 25, 39.

bilities, and it may be, new hazards, are added to the original undertaking. He may be very willing to embark in one enterprise, and unwilling to engage in another; to assist in building a short line of railway, and averse to risking his money in one having a longer line of transit. But it is not every unimportant change which would work a dissolution of the contract. It must be such a change that a new and different business is superadded to the original undertaking." [1]

§ 344. Illustration: Effect of Guaranty that Stock of Precedent Corporation shall be at Par at a Future Date Named.— A. sold a tract of land to B. for $10,000, and received in payment 200 shares of stock of a railway corporation, of the par value of fifty dollars per share, and B. executed a written guaranty that the stock would be worth par on the first day of October, 1855, in Cincinnati. Subsequently, under an enabling statute of the State of Indiana, the corporation was consolidated with another. The enabling statute provided that "such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected." It had been held in that State that the effect of such a consolidation was to create a new company out of the elements of the two preceding companies.[2] Following this exposition of the State statute by the State court, and applying the principle of the preceding section, the Supreme Court of the United States held that B. was liable on his guaranty, and could not set up, in discharge of his liability, the fact of the consolidation; since, as the legislature had no power to force him to become a stockholder in the new company without his consent, he *must be taken to have consented to the change.*[3]

§ 345. View that Majority can Consent, on Giving Security to Dissenting Shareholders.— So, it is stated in a case in Pennsylvania, which has been very much cited: "The contract of consolidation is an act of dissolution in form and substance of the Lebanon company, and the corporation cannot, in the act of dissolution, dispose of the rights of its members. The act of dissolution, like the act of association, is not a corporate act, but an act of the members of the association. They may com-

1 Clearwater *v.* Meredith, 1 Wall. (U. S.) 25, 40.

2 McMahan *v.* Morrison, 16 Ind. 172.

3 Clearwater *v.* Meredith, 1 Wall. (U. S.) 25.

mit to their officers the business of effecting it in all its details, but they are not required to do so by the terms of their association, and in effecting such a purpose the officers would be rather trustees of the members than corporate functionaries. Then it follows, quite obviously, that no corporate act can settle the terms of dissolution, or distribute the effects among the members, and that this company cannot decide what the plaintiff shall take for his interest. The act of dissolution works a change in the form of the interests of its members, by destroying the stock, and substituting the thing which the stock represented,—that is, a legal interest in the property, and leaves the members to seek a division of this. But this property is indivisible, and therefore we see no objection to the act of the legislature, so far as it allows the majority to dispose of it in the way proposed, except that, under the constitution, they cannot be allowed to divest or embarrass the plaintiff's interest therein *without first giving security therefor.* The act of transfer and dissolution is one. If carried into effect, it destroys his stock. Before it is done he must be secured, and we must grant the injunction asked for, to stand until this is done." An injunction was accordingly ordered to be issued, on the plaintiff's giving security to the amount of $1,000 to the defendants; "and let it be dissolved on the defendants giving security to the plaintiff, in double the market value of his stock, to pay for said stock when its value shall be ascertained." [1] This was a case where one corporation was dissolved and extinguished by the conversion of its stock into that of another corporation,—a mere consolidation; and the decision is to be quoted to the point that a majority may force a dissenting minority into such a consolidation, provided they pay them the actual value of their stock,—a proposition which must be regarded as doubtful.[2]

§ 346. Rule where a Statute Authorizes Consolidation at Date of Subscription. — But of course where the consolidation is authorized by a statute existing at the time of the subscription, it will not have the effect of releasing a subscriber although he

[1] Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 49.

[2] See Mowrey v. Illinois &c. R. Co., 4 Biss. (U. S.) 78, where it is criticised by McDonald, J.

did not consent to it, unless the effect of the consolidation is such as to work a material change in the organization and design of the company as originally projected.[1] Subscriptions to the capital stock of corporations are to be construed with reference to the statutes in force relating to the subject of consolidation, on the theory that governing statutes enter into and form a part of every contract of stock subscription. It is, therefore, no defense for a stockholder of one of the original companies, in an action upon his subscription by the consolidated company, to say that, as he only subscribed for the stock of the original company, his contract has been changed by the consolidation without his consent.[2] In such a case, where a county, which had subscribed to the stock of a railroad company, sought to be released from its subscription, on the ground that there had been a subsequent consolidation between the particular company and another, it was said by the Supreme Court of the United States, in an opinion given by Mr. Justice Strong: "It must be conceded, as a general rule, that a subscriber to the stock of a railroad company is released from obligation to pay his subscription by a fundamental alteration of the charter. The reason of the rule is evident. A subscription is always presumed to have been made in view of the main design of the corporation, and of the arrangements made for its accomplishment. A radical change in the organization or purposes of the company may, therefore, take away the motive which induced the subscription, as well as affect injuriously the consideration of the contract. For this reason it is held that such a change exonerates a subscriber from liability for his subscription; or, if the contract has been executed, justifies a stockholder in resorting to a court of equity to restrain the company from applying the funds of the original organization to any project not contemplated by it. But while this is true as a general rule, it has no applicability to a case like the present. The consolidation of the Kankakee and Illinois River railroad company with another company was no departure from its original design. The general statute of the State, approved February 28, 1854, authorized all railroad companies then organized, or thereafter to be organized, to consolidate their property and stock with each

[1] Nugent *v.* Supervisors, 19 Wall. (U. S.) 241.

[2] Mansfield &c. R. Co. *v.* Stout, 26 Oh. St. 241, 255.

other, and with companies out of the State, whenever their lines connect with the lines of such companies out of the State. The act further declared that the consolidated company should have all the powers, franchises, and immunities which the consolidating companies respectively had before their consolidation. Nor is this all. The special charter of the Kankakee and Illinois River railroad company contained, in its eleventh section, an express grant to the company of authority to unite or consolidate its railroad with any other railroad or railroads then constructed or that might thereafter be constructed within the State, or any other State, which might cross or intersect the same, or be built along the line thereof, upon such terms as might be mutually agreed upon between said company and any other company. It was therefore contemplated by the legislature, and it must have been by all the subscribers to the stock of the company, that precisely what has occurred might occur. Subscribers must be presumed to have known the law of the State and to have contracted in view of it. When the voters of the county of Putnam sanctioned a county subscription by their votes, and when the board of supervisors, in pursuance of that sanction, resolved to make the subscription, they were informed by the law of the State that a consolidation with another company might be made; that the stock they proposed to subscribe might be converted into stock of the consolidated company, and that the liability they assumed might become owing to that company. With this knowledge, and in view of such contingencies, they made the contract. The consolidation, therefore, wrought no change in the organization or design of the company to which they subscribed, other than they contemplated at the time as possible and legitimate. It cannot be said that any motive for their subscription has been taken away, or that the consideration for it has failed. Hence the reason of the general rule we have conceded does not exist in this case, and, consequently the rule is inapplicable." [1] This decision is in effect an affirmation of the principle that the subscriber for stock is released from his subscription, by a subsequent alteration of the organization or purposes of the company, only when such alteration is both fundamental and *not provided for or con-*

[1] Nugent *v.* Supervisors, 19 Wall. (U. S.) 241, 248–50; Miller and Davis, JJ., dissenting.

templated by either the charter itself or the general laws of the State. Other American authorities are not wanting in support of this view. In a case in Indiana, after a public act had taken effect, authorizing the consolidation of the charters of two railroad companies, the defendant subscribed for shares in one of them, and a consolidation was afterwards made. He was held liable to the consolidated company for his subscription; and this, though the consolidation took place without his knowledge or consent.[1]

§ 347. Where there is a Reserved Power of Amending the Charter.— The Supreme Court of Errors of Connecticut has gone further, holding that, where a consolidation has been effected by direct legislation, under the reserved power of amending the charter, it is not necessary that the assent of all the stockholders should be obtained, nor that there should be any action of the stockholders or directors on the subject; and this effect has been given to a *validating* or *curative* act of the legislature passed after the subscription and consolidation.[2] But the soundness of this conclusion is doubted, on a principle elsewhere discussed.[3]

§ 348. Power to Amend Articles does not Extend to Consolidation.—The articles of association of a company prohibited the union or consolidation of the company with any other, without the consent of a majority of the stockholders, but also contained a clause providing for an amendment of the articles by a concurrent vote of two-thirds of the executive committee and a majority of the trustees. It was held, that the authority to amend the articles of association gave no power to take away from the stockholders the power to prohibit the merger of the company with any other company, which they had expressly reserved for their own protection. Such authority to amend should be limited to amendments pertinent to the business and objects for which the association was organized.[4]

§ 349. When Entitled to an Injunction to Restrain Consolidation. — Where the general rule first stated[5] has not been

[1] Sparrow *v.* Evansville &c. R. Co., 7 Ind. 369. To the same effect see Bish *v.* Johnson, 21 Ind. 299; Compare Cork &c. R. Co. *v.* Patterson, 37 Eng. L. & Eq. 398, and Nixon *v.* Brownlow, 3 Hurl. & N. 686.

[2] Bishop *v.* Brainard, 28 Conn. 289.

[3] *Ante*, §§ 90, 91.

[4] Blatchford *v.* Ross, 54 Barb. (N. Y.) 42; *s. c.* 5 Abb. Pr. (N. S.) (N. Y.) 434; 37 How. Pr. (N. Y.) 110.

[5] *Ante*, § 343.

displaced by valid and operative legislation, the dissenting shareholder is entitled to an injunction to restrain the proposed consolidation, on the ground that the directors and officers of the corporation of which he is a member, in carrying it out, are attempting an unauthorized and illegal *diversion* of the *trust funds* committed to their care, — at least until his interest in the corporation is secured.[1] Nor is it necessary in such a case, as it is in many others,[2] for the dissenting shareholder to make a vain and useless attempt to obtain redress within the corporation, by asking the corporation, that is to say the majority who have determined upon the unauthorized consolidation, to bring an action against themselves;[3] but it is necessary to make the corporation of which he alleges that he is a member, a party defendant.[4] Nor is it a ground for dissolving an injunction against an unlawful attempt to consolidate one corporation with another, that the attempt had been *abandoned*, where the abandonment is not

[1] Lauman *v.* Lebanon &c. R. Co., 30 Pa. St. 42; State *v.* Bailey, 16 Ind. 46; Mowrey *v.* Indianapolis R. Co., 4 Biss. (U. S.) 78; Nathan *v.* Tomkins, 82 Ala. 437; 19 Am. & Eng. Corp. Cas. 336; 2 South. Rep. 747; 2 Rail. & Corp. L. J. 315. In England, where the power of *Parliament* is supreme and unrestrained by any constitutional prohibition against impairing the obligation of contracts, its power to authorize the amalgamation of companies created for public objects, such as railway companies, without the consent of all the shareholders, has never been doubted. In that country a shareholder in a railway company is entitled to restrain the directors from carrying into effect an agreement with another railway company for the amalgamation of their lines, which has not received the sanction of the legislature. So held where such agreement contained clauses providing for throwing the receipts into the common fund, and dividing the profit and loss in certain proportions, and also for handing over the entire management and plant of one company to the other. Charlton *v.* Newcastle &c. R. Co., 5 Jur. (N. S.) 1096; 7 Week. Rep. 731. The principle is a very general one that an injunction will be granted, at the suit of a dissenting shareholder, to restrain the directors and managing officers of a corporation from diverting its funds to objects not authorized by the governing statute. *Post*, Ch. 90. A very learned decision on this question is the case of Stevens *v.* Rutland &c. R. Co., published as an appendix in 29 Vt. 545, where Chancellor Bennett issued an injunction, at the suit of a stockholder, to restrain the directors of a railway company from applying its funds or pledging its credit for the purpose of constructing a road beyond the *termini* fixed by the statute of its creation.

[2] *Post*, Chs. 90 and 187.

[3] Nathan *v.* Tompkins, 82 Ala. 437. *Contra*, Mozley *v.* Alston, 1 Phil. Ch. 790.

[4] Ridgway Township *v.* Griswold, 1 McCrary (U. S.), 151.

shown, by an official declaration or by the rescission of the resolutions under which the consolidation was attempted.[1] A clause in the charter that the company, "in matters not expressed in the charter, shall have the rights and privileges to the most favored turnpike companies," will not be construed as conferring or implying power to compel a stockholder to consent that the corporation of which he is a member shall be united with another.[2]

§ **350. Extent of Injunctive Relief Afforded.** — But it has been held that an injunction to prevent the consummation of a consolidation of two companies, which has been agreed upon by their respective directors, and where there has been a consequent transfer of property of one of the old companies to the one newly formed, — ought not to be extended to prevent the use, under the new company, of property which has been delivered before the application for the injunction; nor so as to restrain stockholders who may elect to do so, from uniting in the new organization. But it was held that, in regard to property not delivered, the injunction should be continued and that the directors and executive committee should be restrained from enforcing any compliance with such terms of consolidation by the plaintiff and other shareholders, who were not willing to become members of the new company, by collecting assessments on the shares of the stock, or in any other manner until the final decision of the cause.[3]

§ **351. No Injunction if Interest Secured.** — And while, as already stated, a dissenting shareholder, like a retiring partner in an ordinary partnership, is not obliged, in the absence of a statute operative at the time when his contract of subscription was made, or of an express agreement to that effect, to surrender his interest in the property to his remaining associates at an estimated valuation, but has the right to have the valuation actually ascertained by a *sale*, in the ordinary manner of closing up partnerships where there is no express stipulation; yet such an injunction will not, in one doubtful view,[4] be continued after his interest has been secured. And another court has held

[1] Nathan *v.* Tompkins, 82 Ala. 437.

[2] Botts *v.* Simpsonville &c. Turnpike Co., 88 Ky. 54; *s. c.* 10 S. W. Rep. 134. Injunction should not be dissolved on answer which fails to allege consent of the plaintiff where unanimity is necessary: *Ibid.*

[3] Blatchford *v.* Ross, 54 Barb. (N. Y.) 42; *s. c.* 5 Abb. Pr. (N. S.) (N. Y.) 434; 37 How. Pr. (N. Y.) 110.

[4] *Ante*, § 345.

that, where the amount of dissenting stock is inconsiderable in comparison with the stock whose owners have acquiesced in the agreement of consolidation, the court will order the consolidated company to give a bond with sureties, conditioned that, upon the final judgment, all the property transferred to it shall, if so required by the judgment, be delivered into the custody of the court, for the protection of all the shareholders.[1]

§ 352. Action in Equity against the Consolidated Company.— Where a consolidation between two corporations is wrongfully effected, a dissenting stockholder of one corporation may maintain an action in equity against the consolidated corporation, for the damages which he has sustained, upon the theory of a wrongful *appropriation* by it of *his equitable interest* in the original corporation of which he was a member. In such a case he is not barred by a *delay* of two years, though such a delay might operate to prevent him from maintaining a suit to restrain the consolidation.[2] In such an action the shareholder is not precluded by the erroneous estimates of the officials of the corporation of which he was a member, embodied in a published report, from showing the true *value* of its assets.[3]

§ 353. No Right of Action for Damages against Directors.— Where the consolidation is effected by the action of the shareholders, it cannot be made the foundation of an action by a dissenting shareholder against the directors for damages.[4]

§ 354. Effect of Acquiescence of Shareholders.[5] — Of course, the shareholders who consent to the consolidation, thereby estop themselves, in the absence of fraud, from raising future objections to it.[6] They also become *estopped* to object to any precedent steps which have formed an inducement to the consolidation. Thus, where an *amendment* of the charter was one of the chief steps leading to the consolidation of a railway company with another, the stockholders in the former company, who assumed to be corporators in the consolidated company,

[1] McVicker *v.* Ross, 55 Barb. (N. Y.) 247.

[2] International &c. R. Co. *v.* Bremond, 53 Tex. 96.

[3] *Ibid.*

[4] International &c. R. Co. *v.* Bremond, 53 Tex. 96.

[5] Compare *ante*, § 80.

[6] To this principle see Zabriskie *v.* Hackensack &c. R. Co., 18 N. J. Eq. 179.

thereby became estopped from proceeding in equity to have the amendments to the charter declared void.[1] But a shareholder is not precluded from making such an objection by the fact of his having failed to object to an enlargement of the charter of the former company, which did not, on its face, purport to give the power to consolidate.[2] If a member of the board of directors is present at the adoption of a resolution looking toward a consolidation with another company, and is aware of what is being done, and makes no opposition to its adoption, he is *presumed* to have assented to it. But if the proceeding is merely *preliminary* to a decision by a subsequent vote of the stockholders on the question of consolidation, which question can only be ultimately decided by a vote of all the stockholders, and not by the board of directors, — the consent of such director, so given, does not estop him from afterwards objecting to the consolidation.[3] But a bill in equity alleging that certain railroads were fraudulently consolidated, that the consolidated road issued mortgage bonds, that the mortgage was foreclosed, and a decree of sale made, and asking that the consolidation be declared void, will be dismissed for *laches*, when it appears that the complainants were cognizant of all the proceedings, and took no action until after the decree of sale had been made.[4]

§ 355. Rights of Consolidated Company against Shareholders of Old Companies.— Generally speaking, upon the consolidation being perfected, a stockholder of one of the old companies becomes a stockholder in the new company, so that it may maintain actions thereon for assessments,[5] though this is a matter which may be varied by the governing statute or the contract.[6] This is sometimes effected by a formal assignment, by the old

[1] Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108.

[2] International &c. R. Co. *v.* Bremond, 53 Tex. 96. Delay of two years when no bar. *Ibid.; ante,* § 352.

[3] Mowrey *v.* Indianapolis &c. R. Co., 4 Biss. (U. S.) 78.

[4] Bell *v.* Pennsylvania &c. R. Co., 10 Atl. Rep. 741; 9 Cent. Rep. 138; 2 Rail. & Corp. L. J. 476.

[5] Ridgway Township *v.* Griswold, 1 McCrary (U. S.), 151; Wells *v.* Rodgers, 60 Mich. 525; *s. c.* 27 N. W. Rep. 671; Cooper *v.* Shropshire Union R. &c. Co., 13 Jur. 443, *s. c.* 6 Railw. Cas. (Eng.) 136; Foss *v.* Harbottle, 2 Hare, 461; *s. c.* 7 Jur. 163; Exeter &c. R. Co. *v.* Buller, 11 Jur. 527; Lord *v.* Copper Miners' Co., 18 L. J. (Ch.) 65; Mozley *v.* Alston, 1 Phil. (Ch.) 790; *s. c.* 11 Jur. 315.

[6] Bishop *v.* Brainerd, 28 Conn. 289.

corporations to the new one, of their properties and choses in action. Such a transfer, it has been held, is not invalid against the claim of a creditor of one of the original corporations accruing after the transfer; and it has been reasoned that, even if it had accrued previously, yet the original corporation, in the absence of any fraudulent intent, had a right, for a valid consideration, to dispose of its property.[1] The soundness of this reasoning may, however, be doubted, when it is applied to a disposition of all the property of a corporation, in view of the doctrine that the property of a corporation is a *trust fund* for its creditors. After a consolidation has taken place, and the consolidated company has succeeded to the right to enforce the stock subscriptions of the antecedent companies, and a regular assignment by the officers of the consolidated company of such a subscription of one of the antecedent companies, — as by using the name of such company instead of the consolidated company,— may be validated by a subsequent ratification of the board of directors of the new company.[2] A *subscription* to the stock of the amalgamated company is manifestly a sufficient consent on the part of a shareholder, to the amalgamation.[3] Where it appears from the articles of association of one of the original corporations, which contains among its members a dissenting shareholder, that the consolidation has merely the effect of carrying out the purpose of its organization, such shareholder will not be exonerated from his subscription;[4] for, as elsewhere seen,[5] one corporation may be created with the design of being consolidated with or absorbed by another corporation,[6] and in such a case it will not lie in the mouth of a shareholder of the former to object to such consolidation: it is no change of the contract which he entered into when he made his subscription.[7]

[1] *Ibid; ante*, § 332.

[2] *Ibid.* Where the consolidated company made a call upon its shareholders for the purpose of raising a fund to pay for an indebtedness of *one* of the precedent companies, the English Court of Chancery refused to enjoin the enforcement of the call. Mozley *v.* Alston, 1 Phil. (Ch.) 790; *s. c.* 11 Jur. 315.

[3] Fisher *v.* Evansville &c. R. Co., 7 Ind. 407.

[4] Hanna *v.* Cincinnati &c. R. Co., 20 Ind. 30; *ante*, § 68.

[5] *Ante*, § 346.

[6] Washburn *v.* Cass Co., 3 Dill. (U. S.) 251; Nugent *v.* Supervisors, 19 Wall. (U. S.) 241.

[7] Injunction to restrain a creditor from enforcing his demands against

§ 356. **Action by New Company for Assessments against Shareholders in the Old.** — A railroad corporation may maintain a suit upon a subscription to its capital stock, after consolidation with another company, unless this fact is pleaded in abatement; in which case, if the consolidation is authorized by law, the suit may proceed in the name of the new company, if the consolidation is pleaded in abatement.[1] In England, until the provisions for the amalgamation have been fully carried into effect so that the new company has come into being, no suits for calls against the holders of the consolidated shares can be sustained in its name.[2] So, in America the consolidated company cannot proceed to enforce the stock subscriptions of the antecedent companies until the consolidation is complete, that is to say until it has acquired a distinct corporate existence by complying with the *conditions precedent* named in the statute authorizing the consolidation, — as by filing the instrument of consolidation in the office of the Secretary of State,[3] or by electing a new board of directors.[4]

§ 357. **New Company must Show its Title.** — As the contract of subscription, which is the subject of the suit, does not purport to be made with the consolidated company by name, this company must, on the most obvious grounds, show in what manner it has succeeded to the right of the original company to enforce the contract against the subscriber.[5] It is indeed true that, where a corporation has taken a contract made to it *in its corporate name*, the obligor thereby, under a well understood principle,[6] confesses its existence as a corporation and becomes *estopped*, when sued by the corporation to enforce the obligation, from denying its corporate existence. But this rule does not

a shareholder in one of the precedent companies denied on the ground of an adequate remedy at law: Hardinge *v.* Webster, 1 Drew. & S. 101; *s. c.* 6 Jur. (N. S.) 88; 29 Law J. (N. S.) 161.

[1] Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389; Hanna *v.* Cincinnati &c. R. Co., 20 Ind. 30.

[2] Midland R. Co. *v.* Leech, 3 H. L. Cas. 872; 22 Eng. L. & Eq. 45; 28 Eng. L. & Eq. 17. But see Cork &c. R. Co. *v.* Patterson, 18 C. B. 414; Mansfield &c. R. Co. *v.* Brown, 26 Oh. St. 223.

[3] Mansfield &c. R. Co. *v.* Brown, 26 Oh. St. 223. Compare *ante*, § 240.

[4] Peninsular R. Co. *v.* Tharp, 28 Mich. 506.

[5] Mansfield &c. R. Co. *v.* Drinker, 30 Mich. 124.

[6] *Post*, § 518, and Ch. 184, Art. I.

apply where a consolidated corporation brings an action for an assessment against a stockholder of one of the precedent corporations. Such a stockholder has entered into a contract to pay for certain shares of the stock of corporation A., and this agreement will not support an action against him by corporation B., unless corporation B. alleges and proves a state of facts showing that it has become the successor to the rights under the contract of corporation A. It is not enough, to authorize a recovery in such an action, that the consolidated company is shown to be a corporation *de facto* and entitled to enforce contracts as against parties who have dealt with it. To acquire the rights of the original corporation in its contract with its subscribers, otherwise than by an assignment, it is essential that the statutory requirements of a transfer by succession be complied with, — at least in the absence of any participation by such subscriber as a stockholder, in the business of the new corporation, by virtue of his previous character of stockholder in the original corporation, such as would estop him from disputing the consolidation.[1]

§ 358. Stockholder may Plead no Consolidation. — This principle would be nugatory, if the subscriber to the shares of the precedent corporation were not permitted, in an action upon his subscription by the new company, to set up a defense in the nature of the plea of *nul tiel corporation;* and it has been accordingly held that such a defense is available to him. He may, for instance, dispute the corporate existence of the plaintiff, on the ground that, at the date of the agreement to consolidate, the railroad of the company to whose stock he subscribed, was neither made nor in process of construction, as required by the governing statute before a consolidation could take place.[2] He is not precluded from questioning the validity of the steps which led up to the consolidation, provided he took no part in them, although they may have been sufficient to make the new corporation a corporation *de facto*. The reason is that no change in the corporation

[1] Mansfield &c. R. Co. *v.* Drinker, 30 Mich. 124; Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247, 249; Mansfield &c. R. Co. *v.* Brown, 26 Oh. St. 223.

[2] Mansfield &c. R. Co. *v.* Stout, 26 Oh. St. 241; Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

which has violated any substantial statutory conditions can bind a dissenting stockholder, or compel him to submit to the new order of things against his will.[1]

§ 359. Illustration. — A person who becomes a subscriber to such stock during the progress of the arrangement for consolidation is to be regarded as a stockholder within the meaning of § 10 of the Ohio statute of 1856.[2] After the consolidation is completed by filing a certificate with the Secretary of State, the new corporation thereby created can succeed to the rights, powers and franchises of the original corporation only by operation of the statute, which provides for such succession only upon the election of the first board of directors of the new corporation. As the election is not authorized by the statute before consolidation has been consummated by filing the certificate with the Secretary of State, it follows that the new company, in an action for money due on subscriptions to the capital stock of one of the original corporations, must show that it has succeeded to the rights of its predecessors, by the election of a board of directors of its own.[3]

§ 360. What in Case the Original Subscription was Conditional. — As hereafter seen,[4] in the case of conditional subscriptions to the stock of corporations, if the condition is lawful and expressed in the contract, the corporation cannot enforce its collection without performing the condition. So, in the case of a consolidation, if the subscription to the capital stock of one of the original companies is made upon a *valid condition*, it of course passes to the new company subject to this condition. If, therefore, the subscription is made on the express condition that not more than ten per cent. shall be required at any one call, and that calls shall not be made more frequently than once in sixty days, and the directors of the original company make a general call requiring the installment of five dollars, due upon each share at the time of making the subscription, to be paid at once, and ten per centum or five dollars on each share to be paid on the fifteenth of each month following, until the whole amount shall be paid, —

[1] Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247, 249. See also Mansfield &c. R. Co. *v.* Drinker, 30 Mich. 124.

[2] 53 Oh. Laws, 143.

[3] Mansfield &c. R. Co. *v.* Brown, 26 Oh. St. 223; Mansfield &c. R. Co. *v.* Drinker, 30 Mich. 124. (Decision under Ohio statute.)

[4] *Post*, § 1332.

this call has no validity in its application to the particular subscription, and cannot be enforced against a particular subscriber by the new company.[1]

ARTICLE III. TRANSMISSION OF RIGHTS AND LIABILITIES OF CONSTITUENT COMPANIES.

§ 365. New Company Succeeds to Rights and Obligations of the Old Ones. — As a general rule, the new company succeeds to

[1] Mansfield &c. R. Co. *v.* Pettis, 26 Oh. St. 259. The new corporation may, under the Ohio statute of 1856, perform the conditions named in subscriptions to the capital stock of the original companies, and it may also, by the performance of the conditions, accept a continuing conditional offer to subscribe such stock. Where a general requisition, otherwise termed an assessment or call, is duly made by one of the precedent companies during the pendency of the consolidation proceedings under the above named

the rights, duties, obligations and liabilities of each of the precedent companies, whether arising *ex contractu* or *ex delicto*.[1] The charter powers, privileges and immunities of the corporations pass to and become vested in the consolidated company,[2] except so far as otherwise provided by the act under which the consolidation takes place, or by other applicatory constitutional or legislative provisions.[3] As the power to amalgamate with another corporation is in the nature of a privilege or franchise, the legislature may grant it on terms. It may require, as a condition of the grant, the new company to assume liabilities of the old corporations;[4] and in most cases, no doubt, statutes authorizing the consolidations so provide in express terms.[5] A decision of

act, for the payment of subscriptions to its capital stock in monthly installments, and the consolidation becomes complete before all the installments are due, the requisition will continue in force for the benefit of the consolidated company, provided an officer authorized to receive such payments be continued at the place named in the call. Such a requisition applies to conditional subscriptions as soon as the condition is performed, and to subsequent subscriptions made before the consolidation is complete, as well as to subscriptions absolute at the date of the call. Mansfield &c. R. Co. *v.* Stout, 26 Oh. St. 241.

[1] Ridgway Township *v.* Griswold, 1 McCrary (U. S.), 151; Chicago &c. R. Co. *v.* Moffitt, 75 Ill. 524; Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514; Atchison &c. R. Co. *v.* Phillips County, 25 Kan. 261; Washburn *v.* Cass County, 3 Dill. (U. S.) 251; Paine *v.* Lake Erie &c. R. Co., 31 Ind. 283; Zimmer *v.* State, 30 Ark. 677; Thompson *v.* Abbott, 61 Mo. 176; Barksdale *v.* Finney, 14 Gratt. (Va.) 338; Harrison *v.* Arkansas Valley R. Co., 4 McCrary (U. S.), 264; Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. Rep. 140; Sappington *v.* Little Rock &c. R. Co., 37 Ark. 23; Louisville &c. R. Co. *v.* Boney, 117 Ind. 501; *s. c.* 20 N. E. Rep. 432; 3 Law. Rep. Ann. 435; Selma &c. R. Co. *v.* Harbin, 40 Ga. 706; Montgomery &c. R. Co. *v.* Boring, 51 Ga. 582; Indianapolis &c. R. Co. *v.* Jones, 29 Ind. 465; St. Louis &c. R. Co. *v.* Miller, 43 Ill. 199; Peoria &c. R. Co. *v.* Coal Valley Mining Co., 68 Ill. 489; Baltimore &c. R. Co. *v.* Musselman, 2 Grant Cas. (Pa.) 348; Lewis *v.* Clarendon, 6 Reporter, 609; Baltimore *v.* Baltimore &c. R. Co., 6 Gill (Md.), 288; *s. c.* 48 Am. Dec. 531; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; State *v.* Greene Co., 54 Mo. 540, 551.

[2] Robertson *v.* Rockford, 21 Ill. 451; Toledo &c. R. Co. *v.* Dunlap, 47 Mich. 456; Central R. Co. *v.* Georgia, 92 U. S. 665; New York &c. R. Co. *v.* Saratoga &c. R. Co., 39 Barb. (N. Y.) 289; Daniels *v.* St. Louis &c. R. Co., 62 Mo. 43; Zimmer *v.* State, 30 Ark. 677.

[3] Chicago &c. R. Co. *v.* Moffitt, 75 Ill. 524; Zimmer *v.* State, 30 Ark. 677.

[4] Day *v.* Worcester &c. R. Co., 151 Mass. 302; *s. c.* 23 N. E. Rep. 824.

[5] *Ante*, § 305, *et seq.* See Lightner *v.* Boston &c. R. Co., 1 Lowell (U. S.), 338; Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.), 407; Western &c. R. Co. *v.* Smith, 75 Ill. 496; Hatcher *v.* Toledo &c. R. Co., 62 Ill. 477. It has been observed, in view of numerous

the Supreme Judicial Court of Maine qualifies this rule, by holding that, where the enabling act prescribes that the new company is to have "the powers, privileges, and immunities possessed by each of the corporations" whose union constitutes the new corporation, the latter will have only the privileges, powers, and immunities which the corporation with the *fewest privileges*, powers and immunities possessed, and which were common to all.[1] The mere fact that a corporation is created with the same name and with the same franchises as those possessed by a preceding corporation, does not make it a continuation of the preceding corporation and liable for its debts.[2] But where the legislature authorizes the surrender of the charter of one company and its incorporation into another existing company, in such a sense that the latter company succeeds to the property, rights and privileges of the former and becomes merely its successor, it will be bound for its liabilities.[3]

§ 366. Succeeds to Rights of Old in Respect of Municipal Aid. — The consolidated company succeeds to whatever rights

decisions, that "it is usual for consolidating statutes to introduce more or less the element of succession or continuity of legal person as to existing rights and duties, notwithstanding the fact that, in other respects, the old and new corporations are not the same." Holmes, J., in Hancock Mutual Life Ins. Co. *v.* Worcester &c. R. Co., 149 Mass. 214; *s. c.* 21 N. E. Rep 364; citing Railroad Co. *v.* Railroad Co., 1 Gray (Mass.), 340, 359; Abbott *v.* Railroad Co , 145 Mass. 450, 453; *s. c.* 15 Northeast. Rep. 91; Pullman Palace Car Co. *v.* Missouri &c. R. Co., 115 U. S. 587; *s. c.* 6 Sup. Ct. Rep. 194. Where such is the provision of the statute, the new corporation may lawfully use a *patented invention*, which both the old corporations had been licensed to use, without a formal assignment of it. Lightner *v.* Boston &c. R. Co., 1 Low. (U. S.) 338. Under such a statute provision, a person who was *surety by bond* to one of the companies, before amalgamation, for the conduct of an employé, was liable to the new company for breaches of the bond committed after the amalgamation. Eastern Union Railway Co. *v.* Cochrane, 24 Eng. L. & Eq. 495; *s. c.* 17 Jur. 1103; 23 Law J. (N. S) 61. The power of a railroad company to begin proceedings for the *condemnation of lands* in Michigan, is not lost by its consolidation with another railroad company into a new organization so as to constitute a corporation subject to the laws of the same State as the original company. Toledo &c. R. Co. *v.* Dunlap, 47 Mich. 456.

[1] State *v.* Maine Central R. Co., 66 Me. 488.

[2] For an example of this see Bruffett *v.* Great Western R. Co., 25 Ill. 353, and the very lucid opinion of Walker, J.; *ante*, § 262.

[3] Montgomery &c. R. Co. *v.* Boring, 51 Ga. 582.

each of the old companies possessed in respect of municipal aid. It retains the privilege, conferred by the charters of the old companies, of having such aid voted, if the proper municipal body, or the electors, are so minded; and if the aid has been voted, prior to the consolidation, to one of the constituent companies, the consolidated company is entitled to the bonds.[1] The authority given by the legislature to a county, to subscribe for the stock of a railway company and to issue its bonds therefor, is not extinguished by the subsequent consolidation of the company with other companies. The statute confers a *right* and *privilege* upon the company, which passes, with its other rights and privileges, into the new conditions of existence which it assumes under the consolidation.[2] In holding that it was a privilege to the corporation as well as an enabling act to the county, the Federal court followed a decision of the Supreme Court of Missouri which, as a construction of its own statute, was binding upon the Federal tribunal. The Missouri court said: "The power thus conceded to the counties or other municipal bodies may well be termed a privilege to the corporation, and we see no substantial objection to a transfer of such a privilege by symbol, in general terms, embodying the section of the original act which granted it into the new law. That such was the intention of the legislature and of the railroad company is clear; and, if the word 'privilege' admits of the narrow construction claimed, the practical construction it has derived in this State, as may be seen by reference to the decision of our courts, would preclude any inquiry into the subject now. These provisions were the principal means by which this and other roads were built, and without them the charters would have

[1] East Lincoln *v.* Davenport, 94 U. S. 801; Henry County *v.* Nicolay, 95 U. S. 619; Callaway County *v.* Foster, 93 U. S. 567; Scotland County *v.* Thomas, 94 U. S. 682; Smith *v.* Clark County, 54 Mo. 58; State *v.* Greene County, 54 Mo. 540; Hannibal &c. R. Co. *v.* Marion County, 36 Mo. 294; Branch *v.* Charleston, 92 U. S. 677; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; Hanna *v.* Cincinnati &c. R. Co., 20 Ind. 30; Washburn *v.* Cass Co , 3 Dill. (U. S.) 251; Nugent *v.* Supervisors, 19 Wall. (U. S.) 241; Atchison &c. R. Co. *v.* Phillips County, 25 Kan. 261.

[2] Scotland County *v.* Thomas, 94 U. S. 682. To the same effect see Lewis *v.* Clarendon, 6 Reporter, 609; Smith *v.* Clark County, 54 Mo. 58; Hannibal &c. R. Co. *v.* Marion County, 36 Mo. 294; State *v.* Greene County, 54 Mo. 540; Henry *v.* Nicolay, 95 U. S. 619.

been of no value."[1] Thus, where the charter of a railway company empowered the county courts of the counties along the line of its projected road to subscribe for stock in such company, and issued the bonds of their respective counties in payment thereof, and such railroad company became merged in another railroad company by a consolidation, so that its road became a branch of the road of the latter company, the charter right of having the aid of the counties passed to the latter company, and the bonds of such counties, issued and delivered to the latter company, were valid.[2] In such a case the principle, which upholds rights depending upon the existence of corporations *de facto*, applies in favor of an innocent holder of the bonds; so that, where the validity of the consolidation has not been disputed by the State, or by any stockholder, the municipality can not dispute it by way of defense to an action on the bonds.[3]

§ 367. When Consolidation Revokes Power to Subscribe.— But where authority has been given to a *county court*, by the electors of a *township*, to subscribe in its behalf for stock in a certain railway company, this authority does not continue to exist after the company ceases to exist in its separate character, by being consolidated with another company. The reason is that the county court is the mere *agent* of the township, having no discretion to act beyond the precise terms of the power given. The powers of an agent or attorney, authorized to act for another, are very different from those possessed by a person acting in his own behalf. Authority given to a person, to be exercised for his own benefit, and at his own discretion, may be exercised by him under a change of circumstances which would amount to a revocation of a power given to an agent. "So long as it remains unexecuted, the occurrence of any event which creates a revocation in law will extinguish the power. The extinction of the company, in whose favor the subscription was authorized, worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney

[1] Smith v. Clark County, 54 Mo. 58, 67.

[2] State ex rel. v. Greene County, 54 Mo. 540. Vories, J., dissented.

[3] Washburn v. Cass County, 3 Dill. (U. S.) 251.

and constituent. It may transfer the vested rights of one railroad company to another, upon a consolidation being effected, but it does not continue in existence powers to subscribe for stock given by one person to another, which, by the general law, are extinguished by such change."[1]

§ 368. **Succeeds to Exemption from Taxation.** — If the precedent corporations enjoy, under their statutes, an exemption from taxation, and if the statute authorizing the consolidation provides by whatever language that the new company shall succeed to the rights, privileges and immunities of the old, this exemption from taxation will pass to and become vested in the new corporation.[2] If *one* of the precedent corporations enjoys this exemption, it will not be enlarged by the consolidation. Nor will it be diminished; but, as to its property which passes to the new corporation, the latter will take it subject to the exemption.[3] Thus, where one of the consolidating companies enjoyed under its charter an exemption from taxation, this exemption did not, by the consolidation, become extended to the new company in respect of its entire road, but only in respect to *that portion* of it which it had acquired from the company which had enjoyed the exemption.[4] So, where one company, which, under its charter enjoyed an exemption from taxation for a limited period, became merged in another company which enjoyed a perpetual exemption, this perpetual exemption did not, by the consolidation, become extended to the road of the company which thus became merged.[5]

[1] Harshman *v.* Bates County, 92 U. S. 569. This case is distinguishable from Scotland County *v.* Thomas, 94 U. S. 682, and other cases cited in the preceding section, on the ground that in the latter case there was no question of agency.

[2] Southwestern R. Co. *v.* Georgia, 92 U. S. 676; State *v.* Woodruff, 36 N. J. L. 94. A statute providing that "all rights" as to a line of railway which "are and have been legally vested" in one corporation shall pass to another corporation upon a sale by one to the other, passes a right of exemption from taxation, where such right exists in the vendor company at the time of the sale. Atlantic &c. R. Co. *v.* Allen, 15 Fla. 637.

[3] Central Railroad &c. Co. *v.* Georgia, 92 U. S. 665, 675; Phila. &c. R. Co. *v.* Maryland, 10 How. (U. S.) 376; Delaware Railroad Tax Case, 18 Wall. (U. S.) 206; Tomlinson *v.* Branch, 15 *Id.* 460; Charleston *v.* Branch, 15 Wall. (U. S.) 470; Branch *v.* Charleston, 92 U. S. 677; State *v.* Phila. &c. R. Co., 45 Md. 361; Chesapeake &c. R. Co. *v.* Virginia, 94 U. S. 718.

[4] Phila. &c. R. Co. *v.* Maryland, 10 How. (U. S) 376.

[5] Tomlinson *v.* Branch, 15 Wall. (U. S.) 460.

§ **369. How as to Accretions and Betterments.**— When two railroads are thus united, one of them enjoying an exemption from taxation and the other not, embarrassing questions may arise in applying this principle. Although now held by one corporation, the property which enjoyed the exemption continues to enjoy it, and that which did not enjoy such an exemption remains subject to taxation. But how shall the rule be applied in respect of *improvements* and *additions* put upon the property of one or the other sections by the new company? These questions have been the subject of consideration by the Supreme Court of the United States.[1] In the last of these cases the court, in carrying out the principle already stated, held that any repairs or improvements made on the old line, or the property of the old company, would become a part thereof and subject to taxation, since its original property was subject to taxation; but newly acquired property might not be. The court laid this down only as the general principle, and admitted that the method of carrying it out in detail admits of some latitude for the exercise of deliberation and judgment; and the court affirmed a decree, rendered on the report of a special master, with the exception that an item of $25,000, for replacing the tracks and side tracks within the limits of the city of Charleston, fairly belonged, in the opinion of the court, to the old road, which did not enjoy the exemption, and hence should have been taxed *in toto* and not *pro tanto*.[2]

§ **370. When Exemption Lost.**— But where the exemption from taxation, although vested in both of the uniting companies depends upon the performance of certain precedent acts to be done by such companies, and the new corporation is neither required by the act of consolidation, nor *able* to perform such precedent acts, it does not succeed to the right of exemption.[3] It is a well settled principle of law that, when a creditor has *two classes of claims* against his debtor, by uniting them in one suit and obtaining judgment thereon, he reduces that in which his rights are superior, to the level of that in which his rights are in-

[1] Branch *v.* Charleston, 92 U. S. 677. See also Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; Charleston *v.* Branch, 15 Wall. (U. S.) 470.

[2] Branch *v.* Charleston, *supra.*

[3] State *v.* Maine Central R. Co., 66 Me. 488; *s. c.*, aff'd, 96 U. S. 499.

ferior.[1] Thus, by joining *lien* debts and *non-lien* debts in one suit and obtaining judgment, the priority of right, to which a portion of the debts was entitled before such joinder, is lost, and the lien is extinguished. Upon this ground it has been held that, by the consolidation of corporations claiming an exemption from general taxation, with those not thus exempt, the right of limited and conditional taxation exists no longer in favor of those which had that right, it being impossible in this confusion of estates to ascertain when the contingency would happen,— when the fraction of the new and consolidated corporation would become liable to the special and limited taxation prescribed in the charter of such fraction, as it existed before the consolidation. "The acceptance of the new charter is a surrender of exemptions as before existing. The State makes no surrender of any of its general rights of sovereignty, or of its reserved rights." [2]

§ 371. Special Immunities Pass by the Consolidation. — Special immunities inhering in one of the precedent corporations, although attaching to its officers and agents, may pass to the new company by the consolidation, — such as an exemption by its charter of its officers, agents and servants from military, jury and road duty.[3]

§ 372. Liability of New for Debts of Old. — Where one corporation goes entirely out of existence, by being annexed to or merged into another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the surviving corporation will be entitled to all the property, and answerable for all the liabilities of the other.[4] The liabilities of the old corporations are enforcible against the new one, in the same way as if no change had been made.[5]

[1] Bicknell *v.* Trickey, 34 Me. 273; Miller *v.* Scherder, 2 N. Y. 262.

[2] State *v.* Maine Central R. Co., 66 Me. 488, 511; *s. c.* aff'd, 96 U. S. 499. The general Michigan railroad law, in permitting the consolidation of railroad companies within the State with others beyond its boundaries, contemplates leaving the domestic company in its original position as to stocks and loans, and annexing to its capital and loans those additions which are made proportional to the original amounts. Lake Shore &c. R. Co. *v.* People, 46 Mich. 193.

[3] Zimmer *v.* State, 30 Ark. 677.

[4] Thompson *v.* Abbott, 61 Mo. 176. This rule had reference to corporations for school purposes.

[5] Indianapolis &c. R. Co. *v.* Jones,

§ 373. Statute of Consolidation Valid, although not Providing for Payment of all Debts of Absorbed Company. — A decision of the Supreme Court of the United States must, it is believed, be quoted in support of the proposition that an act of consolidation is valid, although it does not provide for the payment of all the debts of the absorbed company, but provides, in a schedule, for the payment of certain debts, from which a valid claim is omitted; and further, that the omitted claimant can not maintain a suit in equity to have his claim audited and paid, in the manner provided by the statute for the payment of the debts which are included in the schedule. The case was that the Potomac Company, having a charter from the States of Maryland and Virginia, was authorized by the legislatures of those States, with the consent of the stockholders, to surrender their charter, and assign all the "property, rights and privileges, by them owned," to the Chesapeake and Ohio Canal Company, which was done. By the charter of the latter company, they were to receive stock of the Potomac Company, not exceeding a certain amount, in payment for their own stock issued to the holders, and were to pay the claims of creditors of the Potomac Company, regularly certified by the president and directors of the latter company, — provided they should not, in the whole, exceed a certain amount. On a bill against the new company, by a judgment creditor of the Potomac Company, whose debt was not included in the list of debts certified by the president and directors of the latter company, to compel payment of his judgment, it was held, that Virginia and Maryland had authority to authorize the surrender of their charter, by the Potomac Company, with the consent of the stockholders, and that the Canal Company were not bound, by their charter, to satisfy the complainant's judgment. The court, speaking through Mr. Justice McLean, said: "There can be no doubt that the States of Virginia and Maryland, in granting the charter of the Chesapeake and Ohio Canal Company, had the power to authorize a surrender of the charter of the Potomac Company, with the consent of the stockholders; and to make the provision which they did make for the creditors of the company. This assignment does not impair the obligation of the contract of any creditor of the company, nor place him in a worse situation in regard to his demand. The means of payment possessed by the old company are carefully preserved, and, indeed, guaranteed by the new company. And if the fact can be established, which is denied by the defendants, that some *bona fide* creditors of the

29 Ind. 465; Montgomery &c. R. Co. *v.* Boring, 51 Ga. 582. An action may be brought against the new company to recover damages for the *negligence* of one of the old companies in its character of a common carrier of passengers. *Ibid.*

Potomac Company were unprovided for in the new charter, and consequently have no redress against the defendants, it does not follow that they are without remedy. It may be that all the creditors whose demands make up the sum of $175,800, have not claimed stock in the new company, or in the proportionate dividend secured to them. But if they have not asserted their right to stock or the dividend, they may well claim either, and the defendants are bound to satisfy their demand."[1] It seems that the court regards the assets of the absorbed company as being, by virtue of the statute of consolidation, impressed with a *trust for the particular creditors named* in the schedule; and while the court says that it does not follow that the complainant is without remedy, it does not state what, if any, remedy he has. Modern holdings would, it is believed, on the general implications of the law, allow a party standing in such a position as the complainant in this case did, to bring a direct action against the consolidated company, and recover a judgment *in personam.*

§ **374. Act of Merger after Mortgage Foreclosure.** — As already stated,[2] the foreclosure of a railway mortgage has the effect of extinguishing, not only the rights of the shareholders, but also those of the general creditors, unless it is otherwise provided in a statute operative at the time of the mortgage, or by some arrangement made between parties interested, at the time of its foreclosure.[3] If, therefore, there has been, prior to the consolidation, the foreclosure of a mortgage upon all the property and franchises of one of the companies, the effect of the consolidation does not make the new company liable for the general debts of the company, existing prior to the mortgage foreclosure. In such a case, the general creditor could only claim *through* the purchasers at the foreclosure sale; and, as already seen, he can have no rights against them except on the conditions above stated.[4] Nor will a statute, providing for a consolidation and enacting that the consolidated company shall be liable for all the debts of each company entering into the arrangement, be construed as *retrospective*, in such a sense as to *revive* the general debts of one of the antecedent companies, which have been cut off by a mortgage foreclosure, and to make the consolidated company liable therefor; and if such a statute were in terms retroactive, it would be invalid, as impairing the obligation of the contract between the original corporation and its mortgagee.[5] By statute in Texas, "the

[1] Smith *v.* Chesapeake & Ohio Canal Co., 14 Pet. (U. S.) 45, 47. Compare Thomas *v.* Visitors of Frederick County School, 7 Gill & J. (Md.) 369.

[2] *Ante,* § 263.

[3] *Ante,* §§ 260, 267.

[4] Houston &c. R. Co. *v.* Shirley, 54 Tex. 125.

[5] Hatcher *v.* Toledo &c. R. Co., 62 Ill. 477.

road-bed, track, franchise and chartered rights and privileges" are to be deemed an entire thing and to be sold as such; and "the purchaser or purchasers at such sale and their associates shall be deemed and taken to be the true owners of said charter, and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent as if they were the original corporation (*sic*) of said company; and shall have power to construct, complete, equip and work the road, upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws of the State."[1] It is further provided that such sale shall not pass to the purchaser any right to recover of "former stockholders any sums which may remain due upon their subscriptions of stock, but said stockholders shall continue liable to pay the same in discharge and liquidation of the debts due by the sold-out company." The directors of the sold-out company, at the time of the sale, are made "trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands. And no suit pending for or against any railroad company at the time that the sale may be made of its road-bed, track, franchise, and chartered privileges, shall abate, but the same shall be continued in the name of the trustees of the consolidated company.[2] Construing these provisions, it is said: "The plain intent of the statute is to transfer the road-bed, track, franchise and chartered rights entire to the purchaser and associates, upon their adopting the form of organization prescribed in the charter and complying with its other requirements; and to remit creditors, unsecured by lien, to their remedy against such assets as pass to the trustees of the sold-out company. Under this statute, it is believed that a number of railroads in this State have been sold out and purchased by individuals, who have proceeded to organize and manage the corporation under the original charter.[3] Not only the road-bed and other mortgaged property, but the franchises to operate a road and the

[1] Pasch. Dig. Tex. Stat., art. 4912; Rev. Code Tex., art. 4260.

[2] Pasch. Dig. Tex. Stat., arts. 4915, 4916; Rev. Code Tex., arts. 4262–5.

[3] Citing Galveston R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 474.

very corporate existence of the sold-out railway passes to the new organization by virtue of the statute. Ordinarily such purchaser and associates need no further legislation."[1]

§ 375. Liable in Equity to Extent of Assets Received. — Where several corporations are united in one, and the property of the old companies is vested in the new, the latter is liable in equity for the debts of the former, at least to the extent of the property received from them; and if it is also liable at law, the legal remedy is not exclusive.[2] The governing principle here is that a corporation cannot give away its assets to the prejudice of its creditors;[3] but that a court of equity will follow such assets as a trust fund into the hands of any new custodian, the same not being a creditor or *bona fide* purchaser.[4] It is scarcely necessary to add that, in such a case, the consolidated corporation holds the property received from the absorbed company with *notice* of any trust attaching to it in favor of its creditors, and cannot claim the rights of a *bona fide purchaser without notice*.[5]

§ 376. Observations and Illustrations. — A statute which provides for a consolidation by the purchase by one company of the stock of another, and the issue of its own stock for the same, and which adds that "the purchases herein provided for, or the surrender of the franchises, shall in no way affect the rights of the creditors of the company," that is, of the absorbed company, — gives to the general creditors of such company a remedy in equity against the assets of the absorbed company in the hands of the absorbing company, upon the theory of a lien, and is not limited to the vain and ideal remedy of an action at law against the absorbed company, although the existence of such company is continued for the purpose of such actions.[6] In so holding it was said: "If, leaving its debts unpaid, its capital, property and effects are distributed among the stockholders, or transferred for their benefit to third persons who are not *bona fide* purchasers without notice — and still more, if the corporation be dissolved, or become so disorganized that it

[1] Houston &c. R. Co. *v.* Shirley, 54 Tex. 125, 138, 139.

[2] Harrison *v.* Arkansas Valley R. Co., 4 McCrary (U. S.), 264; Barksdale *v.* Finney, 14 Gratt. (Va.) 338; *ante*, § 265.

[3] Goodwin *v.* McGee, 15 Ala. 232.

[4] Curran *v.* Arkansas, 15 How. (U. S.) 307; Bacon *v.* Robertson, 18 *Id.* 48; Hightower *v.* Thornton, 8 Ga. 503.

[5] Montgomery &c. R. Co. *v.* Branch, 59 Ala. 139, 154; The Key City, 14 Wall. (U.S.) 653.

[6] Montgomery &c. R. Co. *v.* Branch, 59 Ala. 139.

cannot be made answerable at law, — then a court of equity will pursue and lay hold of such property and effects, and apply them to the payment of what it owes to its creditors. A suit having that object is the most direct, if not the only efficient means of asserting and vindicating any right of the creditors, in such a case as the present; and, by holding that it is not maintainable, we should refuse to give any real effect to the saving clause in the statute, if such a clause was necessary to enable them to maintain the suit. Certainly if, by virtue of the act, one of the contracting companies might transfer all of its ample property and effects, out of which its creditors ought to be paid, to the other and weaker company, in consideration of its admitting stockholders of the former to become shareholders of its capital and property thus augmented, and might then, by a sort of legal suicide, slip out of existence, leaving those creditors to sue at law the surviving company, which they had never dealt with, or accepted as their debtor, their rights would be very seriously affected thereby."[1] - - - - Another excellent illustration of the principle of the preceding section is found in a well considered case in Virginia where the president and acting manager of a mining corporation which will be designated as the B. company, who owned most of the shares in it, contracted with certain persons that he would obtain an act of incorporation for a new company, with provisions which would enable them to conduct the business in England; that he would cause to be transferred to the new company all the property of the B. company (except slaves and some specified lands) and all the shares of stock in that company; for which they were to pay him a certain sum of money and a royalty upon the product of the mines. The new company was organized, and the shares of stock in the B. company were transferred on their books to the new company, but there was no conveyance of the real estate, which, however, the new company took possession of and held as its own. It was held that the new company was the successor of the old, and held the property of that company subject to its debts, and that equity would charge it with the payment thereof.[2]

§ 377. Rule does not Apply to Bona Fide Sale of Assets. — The foregoing does not, it is assumed, apply to a *bona fide* sale, for a good consideration, by one company, of all its properties, to another. In such a case the *consideration* of the sale would pass to the directors of the selling company, and they would hold it as a trust fund for their creditors first and their shareholders

[1] *Ibid.* 153, per Manning, J.

[2] Barksdale *v.* Finney, 14 Gratt. (Va.) 338.

next. It would be a mere substitution of trust funds, and the purchasing company would not, on well settled principles, be bound to see to its proper application by the directors of the selling company.[1] Such purchases can only take place under two conditions: 1. Where they are authorized by the legislature. 2. Where they are sanctioned by the stockholders, both of the purchasing and of the selling company. In such a case there is no principle which makes the purchasing corporation liable for the debts of the selling corporation, except so far as it has undertaken, under the terms of the contract of purchase, to become so liable. It is precisely the same as a purchase by one individual of the property of another individual. If the purchase is in good faith and for a valunble consideration, it will stand, although it may operate to defeat the creditors of the seller.[2] Where the transfer is of this nature, a bill in equity by a creditor of the selling corporation, brought against the purchasing corporation, which contains no allegation of fraud nor that the transfer was not made for a valuable consideration, nor that the defendant was not a *bona fide* purchaser, nor that there was any *trust* for the benefit of creditors, — will be dismissed.[3]

§ 378. **Rights of Bona Fide Purchasers from Consolidated Company.** — A simple contract debt, owing by one of the antecedent companies, does not constitute a *lien* upon the property of such company, which passes into the hands of the consolidated company; though, while it remains in the hands of the consolidated company it will be chargeable in equity with any of the debts of the antecedent company, the new company not being an

[1] A purchaser in good faith from a trustee is not bound to see to the proper application of the purchase money. Mason *v.* Bank of Commerce, 16 Mo. App. 275; Goodwin *v.* American Nat. Bank, 48 Conn. 564; Shaw *v.* Spencer, 100 Mass. 391; Ashton *v.* Atlantic Bank, 3 Allen (Mass.), 217; Fountain *v.* Anderson, 33 Ga. 337; Rev. Stat. Mo. 1879, § 3937.

[2] Powell *v.* North Mo. R. Co., 42 Mo. 631. See also Bruffett *v.* Greatwestern R. Co., 25 Ill. 353, 356. Although this case seems to have been badly decided on its facts, the *reasoning* of the opinion seems well enough. It was, that there had been, under what had taken place, no consolidation between two railroad companies, but that the property of one had merely been conveyed to the other; and stress was laid on the fact that there was no averment or proof that the defendant held the property otherwise than as a *bona fide* purchaser for a valuable consideration.

[3] Powell *v.* N. Mo. R. Co., *supra.*

innocent purchaser.[1] It follows that if, before any judgment or other lien has attached to the property, the consolidated company conveys it to an innocent purchaser, one who brings an action against the original company and prosecutes it to judgment against the consolidated company, cannot maintain a suit in equity against the innocent purchaser to charge the property in his hands. In the absence of fraud, the case is simply that of a party who is in debt, conveying his property to a third person, who takes as an innocent purchaser.[2]

§ 379. Creditor of Old Corporation not Bound to Accept Responsibility of New. — But while the creditor of the old corporation may pursue his remedy against the new, he is not bound to assent to the arrangement of consolidation so as to create a *novation*, if that term may be used. Thus, where a railroad company agreed to give its bonds in consideration of certain moneys to be paid in installments, and afterwards becoming, by legislative authority, amalgamated with two other companies, tendered the bonds of the consolidated corporation, and brought suit for the money, it was held that the action would not lie, the consideration offered not being that agreed for.[3] The governing principle here is that a party to a contract who disables himself from rendering the agreed consideration, cannot require the performance of a promise which rests on that consideration.[4]

§ 380. Power of New Company to Deal with Credits of Old.— As the new company succeeds to the rights of each of the precedent companies, it may *compromise* and settle a claim against one of them, and sustain an *action* to enforce the settlement;[5] and the *directors* of the new company have *authority* without a vote of the stockholders, to pay and cancel as many of the outstanding obligations of one of the precedent corporations as they may see fit.[6]

1 *Ante*, § 375.

2 McMahan *v.* Morrison, 16 Ind. 172.

3 New Jersey &c. R. Co., *v.* Strait, 35 N. J. L. 323.

4 Keys *v.* Harwood, 2 C. B. 905; Planche *v.* Colburn, 9 Bing. 14; Frost *v.* Clarkson, 7 Cow. (N. Y.) 24; Newcomb *v.* Brackett, 6 Mass. 161.

5 Paine *v.* Lake Erie &c. R. Co., 31 Ind. 283.

6 Shaw *v.* Norfolk County R. Co., 16 Gray (Mass.), 407.

§ 381. Guaranty by the Officers of One Company of the Obligations of the Other.— The courts of New York, with some irregularity and contradiction, have made an innovation upon a strict rule in the law of contracts, by which a promise made by A. to B. for the benefit of C., may become the foundation of an action by A. against C., although C. was privy neither to the promise nor to the consideration;[1] and other courts, especially those which have adopted the modern codes of procedure modeled after that of New York, have adopted the same rule.[2] In New York it has been held that, where such a promise is in the nature of a contract of guaranty, the party for whose benefit the promise was made, may bring an action thereon directly against the guarantor; that the guaranty goes with the principal obligation, and is enforcible by the same person who could enforce the other.[3] But the application of this principle was denied in a case presenting the following facts: Pending negotiations for the *consolidation* of the business of the A. insurance company with the B. insurance company, officers of the A. company wrote that they pledged themselves that all contracts of the B. company, of every name and nature, would be fulfilled, to the same extent and in the same manner as though no change had taken place. The consolidation was effected. Both companies then were solvent, and the A. company agreed to assume the liabilities of the B. company. Afterwards, both companies were dissolved, and the assets of the B. company were insufficient to reinsure its outstanding risks. It was held that the officers of the A. company, who had written as above, were not liable, in an action brought by the holder of a paid-up endowment policy in the B. company. The court laid stress on the fact that the promise which the defendant guaranteed was a pledge that the contract obligations of one of the precedent companies with its policy holders and others, of every nature and kind, would be rigorously fulfilled *to the same extent and in the same manner*, as if the change contemplated had not taken place. The court could not read it, with this language in it, as a guaranty of the *absolute payment* of the obligations of the precedent company, but regarded it as amounting to nothing more than an assurance to the five

[1] See Lawrence *v.* Fox, 20 N. Y. 268, where the doctrine was established by a divided court; also Burr *v.* Beers, 24 N. Y. 180; Ætna Nat. Bank *v.* Fourth Nat. Bank, 46 N. Y. 82; Coster *v.* Mayor &c. of Albany, 43 N. Y. 411; Merrill *v.* Green, 55 N. Y. 270; Claflin *v.* Ostrom, 54 N. Y. 581; Secor *v.* Law, 4 Abb. App. Dec. (N. Y.) 188; Simson *v.* Brown, 68 N. Y. 360; Thorp *v.* Keokuk Coal Co., 48 N. Y. 257; Arnold *v.* Nichols, 64 N. Y. 119; Pardee *v.* Treat, 82 N. Y. 387.

[2] See, for instance, Markel *v.* Western Union Tel. Co., 19 Mo. App. 80; Fitzgerald *v.* Barker, 13 Mo. App. 192.

[3] Claflin *v.* Ostrom, 54 N. Y. 581.

trustees, who were to obtain the amount of stock that would give the absorbing company a controlling interest in the other company, and to the special committee to whom the matter was referred, that the men who were to take the place of the resigning trustees, and who, being a majority, were to have thereafter the control of the absorbed company, would, in conducting its affairs, recognize and fulfill all its pre-existing contract obligations with its policy holders and others.[1]

§ 382. Damages for Refusal to Carry out Obligation of Old Corporation. — Where the new corporation is thus made the heir, so to speak, of the obligations of the old, if the new company refuses to carry out such an obligation, the obligee can maintain an action against it for the resulting *damages*.[2]

§ 383. Illustration: Damages for Refusal to Exchange Bonds for Stock of Consolidated Company. — A statute consolidating two corporations provided that the new corporation should "be subject to all the duties, restrictions, obligations, debts, and liabilities to which at the time of the union either of said corporations is subject," and that "all claims and contracts . . . against either corporation may be enforced by suit or action . . . against the" new corporation. Plaintiff held bonds issued by one of the corporations, convertible into its stock on completion of its road. It was held that, whether or not plaintiff was entitled to demand stock in the new corporation, it was entitled to hold the new corporation to its predecessor's contract; and that, on refusal to deliver stock either in the new or old corporation, on demand, the plaintiff could recover from the new corporation the damages provided for.[3]

§ 384. Right of Bondholder to Notice of Privilege Given him by the Consolidation. — Upon the consolidation of two corporations, the holder of the bonds of one, containing a clause authorizing their conversion at any time into stock at par, cannot be deprived of his right to demand such conversion, and relegated to different rights conferred by the articles of consolidation, until he has had a fair opportunity, after notice, to exercise his

[1] Wise *v.* Morgan, 13 Daly (N. Y.), 402.

[2] Hancock Mutual Life Ins. Co. *v.* Worcester &c. R. Co., 149 Mass. 214; *s. c.* 21 Northeast. Rep. 364.

[3] Hancock Mutual Life Ins. Co. *v.* Worcester &c. R. Co., 149 Mass. 214; *s. c.* 21 Northeast. Rep. 364.

original rights, and has elected not to do so.[1] The words "all the obligations, debts, and liabilities," and "all claims and contracts," in a statute [2] relating to the liability of a consolidated corporation for claims against one of the old companies, include its liability on a contract to exchange stock for bonds; and where such stock would be exchangeable share for share for the stock of the new company, its stock must be delivered.[3]

§ 385. Validity of Bonds of Old Company put in Circulation by New. — Where the consolidation took the form of the absorption of one company into another, without changing in any respect the constituent character of the latter, and certain bonds had been put in circulation by the absorbed company, but had returned into its hands before maturity, and had then passed, by a transfer preceding the consolidation, to the absorbing company, by which company they were re-issued before maturity, — the mortgage securing them being still held by the trustee to whom it was executed, — the court held that, the bonds being commercial paper such as might pass by delivery, the re-issue was legal under the powers conferred upon the absorbing company by the statutes authorizing the consolidation, — intimating also the opinion that the absorbing company would be *estopped* from denying their validity.[4]

§ 386. New Company must Perform Public Obligations of Old. — After the consolidation the new company becomes liable to perform the public duties required of the precedent companies; and if no part of the franchise is reserved to either of the old companies, they will not be liable to the public for the non-performance of the duties thus devolved on the new company. The duties which railroad companies owe to the public, and which are the considerations upon which their privileges are conferred by the legislature, cannot be cast off by an agreement between such companies and other persons or corporations. Therefore, so much of a contract for the consolidation of two railway companies, as operates to prevent a faithful discharge by the new company of its public duties, is void as against public policy.[5]

[1] Rosenkrans *v.* Lafayette &c. R. Co., 18 Fed. Rep. 513.

[2] N. H. Act 1883, chap. 239, and Mass. Act 1883, chap. 129.

[3] Day *v.* Worcester &c. R. Co., 151 Mass. 302; *s. c.* 23 N. E. Rep. 824.

[4] Eaton &c. R. Co. *v.* Hunt, 20 Ind. 467.

[5] Peoria &c. R. Co. *v.* Coal Valley Mining Co., 68 Ill. 489.

§ 387. Illustration. — Where it was agreed, upon the consolidation of two railroad companies, that a corporation which owned one of the roads so consolidated, and which had rolling stock and motive power of its own, should carry coal over a certain part of the road, to a certain amount, without charge, and that the new company should pay the coal company 50 cents per ton for all coal transported by any party except the coal company, it not appearing that the coal company was under any legal obligation to the public to carry coal and passengers after the consolidation, it was held that a court of equity would not enforce the stipulation prohibiting the new company from carrying coal except on paying 50 cents per ton, it being the duty of the new company, under the law, to carry all freights, and the court not having the power to transfer their duty to another.[1]

§ 388. Enforcement of Stipulation in the Contract of Consolidation. — Some difficulty must attend the question of the enforcement of covenants in the contract of consolidation, growing out of the difficulty of ascertaining who are the covenantees. If the contracting parties are the two precedent corporations, such covenants cannot be enforced in an action by one or either of them, because the very nature of the contract is to dissolve them and merge their existence in the new corporations. If it is to be regarded as a contract between the aggregate shareholders of one of the old corporations on the one hand, and the aggregate shareholders of the other of the old corporations on the other hand, then other questions arise in respect of parties and form of relief. These difficulties presented themselves to the Supreme Court of Ohio in a case where two railroad companies, in their agreement for consolidation, had inserted an article providing for the completion and operation of the road of one of the companies, which agreement the directors of the consolidated company had failed to perform. It was held that, if the duty thus created was owing to all the stockholders

[1] Peoria &c. R. Co. *v.* Coal Valley Mining Co., 68 Ill. 489. Liability of consolidated company, in South Carolina, to assessment for expenses of *railroad commission:* Charlotte &c. R. Co. *v.* Gibbes, 27 S. C. 385; 31 Am. & Eng. R. Cas. 464; 4 Southeast. Rep. 49; 3 Rail. & Corp. L. J. 64. Obligation of consolidated *gas company,* in Louisiana, to continue furnishing gas free to charity hospital: Charity Hospital *v.* New Orleans Gas Light Co., 40 La. An. 382; 22 Am. & Eng. Corp. Cas. 569; 4 South. Rep. 433; 4 Rail. & Corp. L. J. 115.

of the new company, one of them could not sustain an action against the directors to enforce performance. On the other hand, if the duty was owing to a class of stockholders having, in respect of the covenant, an interest or right distinct from another class, any proceeding to obtain relief, could only be had after both the directors of the company and the two classes of stockholders had been made parties.[1] But it seems that there is no precedent for a suit in equity to enforce an active duty within the power of the directors. The remedy of the stockholders lies in the election of a new board.[2] "If a court of equity were to assume jurisdiction in such a case, could it do so without opening its doors to all parties interested in corporations, or joint-stock companies, or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere with the conduct of the majority? This cannot be done; and the attempt to introduce such a remedy ought to be checked, for the benefit of the community."[3] "There may be cases, however, where there were classes of stockholders, and a duty may be owing to one class. This might occur where there is preferred stock, and it might possibly happen, that, in the consolidation of two companies, the stockholders of one might, as a class, acquire rights distinct from the stockholders of the other."[4] That individual stockholders have a remedy in equity to *restrain* the fraudulent or *ultra vires* acts of the directors and managing officers, is a principle resting on different grounds.[5]

§ 389. Consolidated Company Subject to Existing General Law Reserving Right of Alteration or Repeal.— On a principle already explained, that the provisions of a general statute existing at the time of the formation of a corporation, unless otherwise stated in the statute creating it, enter into it and form a portion of the grant by the legislature,[6] it has been held that, where two corporations are consolidated under the authority of

[1] Fort Clinton &c. R. Co. *v.* Cleveland &c. R. Co., 13 Oh. St. 544.

[2] *Ibid.*, 561.

[3] Lord *v.* Copper Miners Co., 1 Hall. & Tw. 85, 99; quoted with approval in Fort Clinton &c. R. Co. *v.* Cleveland &c. R. Co., 13 Oh. St. 544, 561.

[4] *Ibid.*, per Gholson, J.

[5] *Ante*, 349; *post*, §§ 1137, 4109.

[6] *Ante*, § 92.

a special act, and there exists at the time a general law declaring that any act of incorporation subsequently passed shall at all times thereafter "be liable to be amended, altered or repealed at the pleasure of the legislature, in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary," — this provision of the general law qualifies the special act authorizing the consolidation, and the consolidated company receives its franchises subject to the right of amendment, alteration or repeal at the pleasure of the legislature,— there being in the special act of consolidation no limitation on such power.[1] It has been added that rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand on a different footing.[2] This principle applies where the consolidation takes place in such a manner that the act of consolidation is to be deemed in law the creation of a *new company*.[3] If the merger is, under the governing statute, of such a character as not to create a new company, but merely to continue the existence of an old one,[4] then a different principle may apply.

§ **390. Illustration.**— A provision of the code of Georgia, which took effect January 1, 1863, enacts that private corporations are subject to be changed, modified, or destroyed at the will of the creator, except so far as the law forbids it; and that, in all cases of private charters thereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negatived in the charter. Two railroad companies, created prior to that date, each of which enjoyed by its charter a limited exemption from taxation, were consolidated, by virtue of an act of the legislature passed April 18, 1863,—subsequent to the taking effect of the code. This act authorized a consolidation of their stocks, conferred upon the consolidated company full corporate powers, and continued to it the franchises, privileges and immunities which the companies had held by their original charters. It was held: 1. That, by the consolidation, the original companies were *dissolved*,

[1] Railroad Co. *v.* Georgia, 98 U. S. 359.

[2] Railroad Co. *v.* Maine, 96 U. S. 499; affirming *s. c.*, *sub nom.* State *v.* Maine Central R. Co., 66 Me. 488. Compare New Jersey *v.* Yard, 95 U. S. 104; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454.

[3] Railroad Co. *v.* Georgia, 98 U. S. 359.

[4] As was the case in Central Railroad &c. Co. *v.* Georgia, 92 U. S. 665.

and a new corporation created, which became subject to the above provision of the code. 2. That a subsequent legislative act, taxing the property of the new corporation as other property in the State was taxed, was not prohibited by that provision of the constitution of the United States which declares that no State shall pass a law impairing the obligation of contracts.[1]

Article IV. Effect on Remedies and Procedure.

§ 395. View that Consolidation Dissolves the Constituent Companies. — It has been frequently said that the usual effect of the consolidation of two railway companies is to extinguish the two companies and to make of them *one new* company.[2] One of the earliest expressions on the subject is found in a decision of the Supreme Court of Indiana to the effect that, where the legislature gives its consent to the consolidation of existing corporations, the effect is to dissolve the former corporations, and at the same instant to create a new corporation, with property, liabilities and stockholders derived from the old, upon such terms and conditions as may be prescribed by the act of consoli-

[1] Railroad Co. *v.* Georgia, 98 U. S. 359.

[2] McMahan *v.* Morrison, 16 Ind. 172; Ridgway Township *v.* Griswold, 1 McCrary (U. S.), 151, 153, per Dillon, J.: Clearwater *v.* Meredith, 1 Wall. (U. S.) 25; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; Fee *v.* New Orleans Gaslight Co., 35 La. Ann. 413.

dation. The court regard this as an illustration of the principle that the corporation may be *dissolved* by a *surrender* of its franchises and the acceptance of them by the legislature.[1] These views received the subsequent sanction of the Supreme Court of the United States;[2] but that court in a subsequent case pointed out that the question was not necessary for its decision, and held that, in the case before it, the effect was not a dissolution of either of the precedent corporations, in such a sense as prevented its immunities from passing to the new.[3] In Louisiana it is said that the consolidation terminates the existence of the original corporations, creates a new corporation, transmutes the members of the former into members of the latter and transfers the property, rights and liabilities of each of the old to the new.[4] In Ohio, the view has been taken that, when a corporation, in pursuance of an act of the legislature, transfers or conveys its franchise to be a corporation to another, the transaction, in legal effect, is a surrender or abandonment of its charter to the corporation, and a grant by the legislature of a similar charter to the transferees; and the charter so granted is subject to all the provisions of the constitution existing at the time it was so granted.[5] In Massachusetts,[6] and in Pennsylvania,[7] the effect of a consolidation has been held to create a *new* corporation out of the members of several existing corporations. In Maine it has been reasoned that the old corporations exist only so far as may be necessary to protect their several creditors or mortgagees, and cease to exist when that necessity ceases.[8] In Texas, the view is that the consolidation extinguishes the precedent companies, so that thereafter no action can be commenced and prosecuted against them.[9] This view seems to be a sound one as to actions commenced after the consolidation, but not as to actions pending before it.

[1] McMahan *v.* Morrison, 16 Ind. 172.

[2] Clearwater *v.* Meredith, 1 Wall. (U. S.) 25, 40.

[3] Central R. Co. *v.* Georgia, 92 U. S. 665, 671.

[4] Fee *v.* New Orleans Gaslight Co., 35 La. An. 413.

[5] State *v.* Sherman, 22 Oh. St. 411.

[6] Hamilton &c. Ins. Co *v.* Hobart, 2 Gray (Mass.), 543.

[7] Com. *v.* Atlantic &c. R. Co., 53 Pa. St. 9.

[8] State *v.* Maine Central R. Co., 66 Me. 488, 500.

[9] Indianola R. Co. *v.* Fryer, 56 Tex. 609.

§ **396. Not Necessarily a Dissolution of Both.** — But it is plain that the consolidation of two corporations does not necessarily work a dissolution of both and the creation of a new one; but that, whether such is its effect, depends upon the legislative intent manifested in the statute under which the consolidation takes place;[1] and distinct expressions on this subject are no doubt found in most of the statutes authorizing consolidations.[2] It has been seen that consolidations frequently take the form of one company *purchasing* the capital stock of another.[3] In such cases, and in others that may be imagined, the terms of the union may be such that one corporation, without any change of name, merely absorbes or annexes the other. In such a case the absorbing corporation continues unaffected and the other is dissolved. *Railway consolidations,* for instance, often take the form of the absorption by one railway of others, as where *branches* are united with a *trunk line,* or short lines are united with longer lines, so as to form one continuous line, — in which case the absorbing company proceeds without any change of name, and succeeds to the rights possessed by the absorbed company. A good illustration of this is found in a case in the Supreme Court of the United States, where the question under consideration was to what extent the Georgia Railroad and Banking Company had succeeded to an *exemption from taxation* possessed by the Macon and Western Railroad Company, which company the former company had absorbed by a consolidation. It was held, in view of the statutes authorizing the consolidation, that the former company had not been dissolved by the fact of consolidation, such not being the intent of the legislature, but had succeeded to the immunity from taxation possessed by the latter company, so far as the property of that company, which passed to the former, was concerned, but no further.[4] Such also seems to have been the case with the consolidation which took place between the New York Central Railroad Company and the Utica and Schenectady Railroad Company. The latter, it was held, became the proper *representative* of the former in regard to *leases* executed

[1] Central Railroad &c. *v.* Georgia, 92 U. S. 665.

[2] *Ante,* § 306, *et seq.*

[3] *Ante,* § 330, *et seq.*

[4] Central R. Co. *v.* Georgia, 92 U. S. 665.

by it, and entitled to the benefit of the provisions of such leases.[1] Again, it is possible, though not usual, for one of the consolidating companies to be *revived* by the legislature as a separate corporation, — though this, it is supposed, should rather be regarded as the creation of a new one.[2]

§ 397. **Further of this Subject.** — Under the statutes of New York, Missouri and other States, the managers or directors of a dissolved corporation have full power as trustees to settle its affairs, if no other trustees are appointed to perform this duty. Such a statute applies to the case of the dissolution of one corporation, by its being absorbed into another, in which case the directors of the dissolved corporation have power to execute a written assignment of a patent to the new corporation, which assignment will pass the legal title.[3] It has been reasoned that, while the consolidation and merger of one corporation in another, whereby it may, in respect of future transactions, lose its separate identity and corporate existence, will not operate to relieve it or its corporators from responsibility to those to whom it may be indebted, — yet it may, by the act of consolidation, become so situated as to be *estopped* from claiming that it remains undissolved, against one who seeks to enforce rights which accrue to him by reason of its dissolution, — as, for instance, against one who has conveyed land to it, and who claims that, by reason of the fact of its dissolution and of fraudulent representations by which the conveyance was procured, the land has reverted to him, instead of passing to the new corporation.[4]

§ 398. **New Company Estopped from Denying its Corporate Name and Character.** — Where an action is brought against the new company upon an obligation of the old, and the act or acts of consolidation, by which it has become the successor of the old in respect of the obligation, are pleaded, and the new company pleads the *general issue*, it is estopped to deny the name in which

[1] New York &c. R. Co. *v.* Saratoga &c. R. Co., 39 Barb. (N. Y.) 289.

[2] See New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418.

[3] Edison Electric Light Co. *v.* New Haven Electric Co., 35 Fed. Rep. 233.

[4] Carey *v.* Cincinnati &c. R. Co., 5 Ia. 357, 367.

it is sued and also to deny that the old company executing the obligation by the name then used, has, by force of the consolidation, assumed the name by which the new company is sued:[1] a decision which seems to mean that, in such a case, the non-liability of the defendant must be specially pleaded and proved. The same principle has been declared with reference to a case where an action was depending against one of the old companies at the time of the consolidation, and the consolidated company *appeared* by its counsel and defended. By so appearing, it admitted its corporate existence, its successorship to the precedent corporation, and its liability in case the precedent corporation should be adjudged liable.[2]

§ 399. **Legal Existence of Old Companies Continued in the New Company.** — The Supreme Court of Indiana has been troubled with the question of the effect of two railroad companies consolidating, upon the rights of action for damages against one of the previous companies, — in the particular case, for killing an animal upon its railway track where it was not fenced. It was contended that the company created by the consolidation was not liable for damages done by one of the precedent companies; but the court overruled this contention in the following language: "By the consolidation, both of the old companies ceased to exist separately, and all their effects and franchises were vested in the new company. The two corporations became merged in one. We cannot imagine how the Indianapolis and Cincinnati Railroad Company [the company by which the alleged damage was done] could afterwards be sued. Upon whom would process be served? It ceased to have any officers or agents. It ceased to be a separate legal entity. Instead of two, there was now but one corporation, made up of the mingled elements of the two pre-existing companies, so combined and merged that neither could be identified and brought into court. But what of the rights of creditors and persons upon whom torts have been committed by the vanished corporations? A dead man may have an administrator to represent his estate and answer to suits, but a

[1] Columbus &c. R. Co. *v.* Skidmore, 69 Ill. 566.

[2] Kinion *v.* Kansas City &c. R. Co., 39 Mo. App. 382.

corporation lawfully disappearing thus, has no estate to be administered. Its assets lawfully vested in the new consolidated corporation. Must lawful claims be lost then? That result cannot follow. The legislature has chosen to make no provision upon the subject; and the industry of counsel, as well as our own examination of the books, has failed to discover any direct authority upon the question before us. The analogies of the law, too, afford little aid in its solution. We regret to be compelled to decide it without a more thorough argument. Giving it, however, the best consideration of which we are capable under the circumstances, we have reached the conclusion that, for the purposes of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely *the same as each of its constituents*, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company the same as if no change had occurred in its organization or name. This doctrine seems to spring from the necessities of justice, and, so far as we are able to foresee, cannot result in wrong or embarrassment." [1]

§ 400. Effect of a Consolidation upon Pending Suits. — The consolidation does not destroy either of the precedent corporations, in such a sense as works an abatement of actions pending against them and requires the plaintiffs in such actions to begin anew against the consolidated company. On the contrary, the effect of the consolidation is rather to blend the two companies together and to continue the existence of each in the united corporation. It may be compared to the mingling of two streams. Ordinarily, therefore, it is not such a dissolution of either of the precedent corporations as will abate an action commenced by or against it before the consolidation was effected.[2]

[1] Indianapolis &c. R. Co. *v.* Jones, 29 Ind. 465, opinion by Frazer, J.

[2] Baltimore &c. R. Co. *v.* Musselman, 2 Grant Cas. (Pa.), 348; Hanna *v.* Cincinnati &c. R. Co., 20 Ind. 30; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389, 394. It has been said that if the rule were different the question could not be raised by a *motion in arrest* of judgment; and that, if the original corporation were to prosecute an appeal to the Supreme Court and give an appeal bond in its own name, it would thereby be *estopped* to deny its corporate existence. East Tennessee &c. R. Co. *v.* Evans, 6 Heisk. (Tenn.) 607.

It has been reasoned that, as to pending suits, the original corporation continues to exist for the purpose of judgment — that as to them it has not lost its individuality or identity. Campbell, J., said: "No act of a defendant can defeat the right of the plaintiff. At common law a *feme sole* defendant marrying after suit brought, though she lost her identity, changed her name and merged her separate existence in that of her husband, did not necessitate the taking of any notice by the plaintiff of her change. He is entitled to judgment against her by her former name. After judgment, *scire facias* is proper to charge the husband.[1] So in the case at bar."[2] Conversely, a suit by one of the consolidated companies, pending at the time of the consolidation,— for example, a suit against one of its shareholders for an assessment, — does not abate by the consolidation, but the original company retains, it has been held, the right to enforce the collection of the subscription.[3] At most, as the cause of action in such a case does not die, but passes to the new company, if this can be regarded a valid objection in any form, it should be pleaded in *abatement*, by a plea *puis darrein continuance*. If so pleaded, the suit can proceed in the name of the new company, upon the proper suggestion being made.[4]

§ 401. View that Action Abates as to Old Company. — In Kansas the exceptional view is taken that, where a railroad company is consolidated with other railroad companies under a new name, it ceases to exist as a corporation, and an action brought by or against such railroad company before its consolidation, cannot afterward be prosecuted by or against it or in its original name.[5]

§ 402. View that New Process is Necessary. — The Supreme Court of Georgia has held that it is error to permit the plaintiff, in a suit pending against one of the precedent companies at the time of the consolidation, to take judgment against the consolidated company in its new name, without taking proper steps to bring the new company, as such, before the court, — which would require a new *notice* and proof

[1] Citing Roosevelt *v.* Dale, 2 Cow. (N. Y.) 581.

[2] Shackleford *v.* Mississippi &c. R. Co., 52 Miss. 159, 160, opinion by Campbell, J.

[3] Hanna *v.* Cincinnati &c. R. Co., 20 Ind. 30.

[4] Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389, 404.

[5] Kansas &c. R. Co. *v.* Smith, 40 Kan. 192; *s. c.* 19 Pac. Rep. 636.

of the fact of consolidation and successorship.[1] It is believed that this view is unsound, and that the true view is that the consolidated company is not a new company in the sense which requires new process. But it must remain that there is a burden upon the plaintiff of alleging and proving the fact of the successorship, unless it has been produced in such a manner as has wrought no change in the corporate name, in which case the rule would apply that identity of name presumes identity of person. But if the consolidated company has taken a different name from the company whose contract, act, or neglect is the foundation of the suit, it should seem that the plaintiff must regularly allege a state of facts which shows the consolidation and successorship in liability, and must also prove the same, unless it is admitted, as it may be a general *appearance* by the new company. This must be so regarded, when it is considered that the consolidation of two private corporations is a fact which takes place *in pais*, which depends upon the concurrence of two things: 1. The passage of an act by the legislature, or the existence of a general statute authorizing the consolidation. 2. An agreement or arrangement of consolidation, followed by the steps prescribed by the statute to bring about the amalgamation of the two companies. As the existence of the statute does not prove the fact of the consolidation, it is plain that the courts cannot take *judicial notice* of it,[2] and that the plaintiff must therefore ordinarily allege and prove it. Another view of this subject is that the effect of the consolidation is to *dissolve* the old company, so that actions thereafter cannot be brought against it, but can only be brought and prosecuted against the new company. When, therefore, an action was brought against the old company, and, by an *amendment* the fact of consolidation was set up and judgment prayed against the new company, and this company filed a general demurrer, it was held error to sustain it; since, by reason of the consolidation, the action could *only* be prosecuted against the new company.[3]

§ 403. View that New Process not Necessary: Effect of Appearance and Oral Evidence of Consolidation.— Where an action had been commenced against one of the old companies, and the only evidence of the consolidation was the *oral admission* of the attorney of the consolidated company, who appeared in the action, and who, in the same breath, delivered the evidence and then objected to it; and it appeared that, in another record between the same parties in the

[1] Selma &c. R. Co. *v.* Harbin, 40 Ga. 706.

[2] Southgate *v.* Atlantic &c. R. Co., 61 Mo. 90.

[3] Indianola R. Co. *v.* Fryer, 56 Tex. 609.

same court, he had delivered the evidence without objection, and the evidence stated that he was "informed unofficially" that a consolidation had taken place at a given date,— the court refused to reverse the judgment on the assignment of error that the fact of consolidation was not sufficiently proved.[1] The court said: "An examination of the decisions will, we think, show that, in a juridical sense, and so far as regards any right of action that existed against either of the corporations prior to their being so united, the effect of a consolidation is not more than a change of name. We do not understand that an action commenced against one of the previous corporations, abates by the consolidation, though the effect may be to dissolve the old corporations as such. On the other hand, we understand that, upon proof of the fact of consolidation being made, the action may be *revived* against the new corporation, by an *amendment*, as was done in this case. We know of no sound reason why the new corporation should be regarded as a different person in a juridical sense, so as to require it to be brought into court by a fresh *service of process*. So to hold would be equivalent to regarding it as a distinct person for all purposes from either of the corporations by the amalgamation of which it was created. The new corporation, for instance, succeeds to the proprietary rights of the old corporation, without any new conveyances.[2] We apprehend that, for juridical purposes, in the case of such a consolidation, the new company may be regarded as identical with either of the old companies, though under a different name; and that, where an action is commenced against one of the old companies, the most that is required for the purposes of practical justice, in order to continue it against the new company, is to prove the fact of consolidation and amend the petition by substituting the new company as defendant, as was done in this case. The new company is the old company; it is each of the old companies. It is simply the onward flow of a stream which is formed by the uniting of two precedent streams."[3] In the other case between the same parties, above alluded to, oral testimony, of the character above stated, of the fact of the consolidation, was given without objection; and it was held that this was tantamount to an *admission* of the fact by the defendant. It was also held that no error was committed in permitting the plaintiff to take judgment against the consolidated company without a new citation, although the action had been commenced against one of

[1] Kinion *v.* Kansas City &c. R. Co., 39 Mo. App. 574.

[2] Citing to this point, Thompson *v.* Abbott, 61 Mo. 176; Lightner *v.* Boston &c. R. Co., 1 Low. (U. S.) 338; Scotland County *v.* Thomas, 94 U. S. 682; State *v.* Greene County, 54 Mo. 540.

[3] Kinion *v.* St. Louis &c. R. Co., 39 Mo. App. 574.

the old companies. The court, speaking through Biggs, J., said: "By the contract of consolidation all property belonging to the old companies, including their corporate privileges and franchises, is transferred to the consolidated company, and there is nothing left to sustain the corporate life of the original corporations. It seems to us that the old companies, by their voluntary act, completely merged their separate existence, and, strictly speaking, a new legal entity was thereby formed. The exact legal *status* of the consolidated company is somewhat anomalous and hard to define. Literally speaking, it is a new corporation, but substantially, it is but the continuation of the old companies under a new name.[1] It is not formed like other corporations. The reincorporation, if we may use the term, is made complete by the mere act of the original companies. The consent of the State is not necessary, and the acts of the original companies leading up to the consolidation need not be ratified or approved by any officer of the State; and it is only made the duty of the Secretary of State to file and record in his office the contract of consolidation. Technically speaking, however, and for general purposes, it may be conceded that the consolidated company is a new corporation; but, touching the business of the old companies and the rights of their respective creditors, we think the consolidated company ought to be regarded as the continuation of the old companies under a new name, and to that extent it ought not to be regarded as a new corporation. Mr. Morawetz, in his treatise on the law of corporations, in discussing this question, said: 'In considering the rights of creditors of original companies, the consolidated company may be regarded as a continuation of each of these respective companies, with a change of its name and constitution and of the amount of its capital stock.' [2] Under this view it was not necessary to bring defendant into court by a *new summons*, and the simple and direct act of substitution adopted by the court was right. If John Smith is sued, and, during the pendency of the suit, he has his name changed to John Jones, a claim that he, as John Jones, must be brought into court by additional summons, would be somewhat novel. Practically, that is this case. We think, however, that the amended complaint ought to have set forth the fact of consolidation, etc., but we cannot see that this omission did any particular harm." [3]

§ 404. Substitution after Referee's Report and before Judgment. — There may be sound reasons, however, why the consolidated company should not be substituted in the place of the new com-

[1] Citing Evans *v.* Exchange Bank, 79 Mo. 182.

[2] Citing 2 Mor. Priv. Corp., § 956.

[3] Kinion *v.* Kansas City &c. R. Co., 39 Mo. App. 382, 385.

pany, after the action has been prosecuted against the new company *to a decision;* because there may be, in particular cases, particular grounds for the conclusion that the properties of the new company should not, in the aggregate, be subjected to the restraints which might, by an injunction or otherwise, be imposed upon the properties of the old. This is illustrated by a case in New York, where the holder of certain preferred stock of one of the old companies, prosecuted a suit in equity against it, to a final decision by a referee, whose report recommended a judgment that the defendant company, its officers, agents, etc., and their successors, be restrained from laying out, expending, disposing of, or in any manner charging the property and assets of the company, or its rights and franchises, until the payment of the amount found to be due should be made. After the coming in of this report the consolidated company was, on motion of the plaintiff, substituted in the place of the original company, and this order of substitution was appealed from. It was held that it was erroneous. The reasoning of the court, in a *per curiam* opinion, was that, as far as the *creditors* of *one* of the original companies were concerned, the consolidated company was the successor of the old company; but that, in respect of the *properties* of the *other* companies, it was a new and independent company, in such a sense that the creditors of one of the old companies had no claim against it upon their original contracts, but only by virtue of its assumption of the obligations of the old company. The court also reasoned that the officers of the new company, so far as the *trust* devolved upon them of managing the property acquired from the old company, occupy, in relation to its creditors, the position of successors to the officers of the old company, and are bound by all proceedings had against them; but that, as to the properties formerly of the other companies, they are successors to the officers of those companies, against whom such creditors have no right of action upon their original contracts. The court concluded with this observation: "It may be that the obligations which the consolidated company has assumed render it just that such a judgment [as the referee had recommended] should ultimately be rendered against it. But, however clearly it may appear that the plaintiff and those in whose behalf the action purports to be brought, are entitled to such a remedy, it can legally be obtained only in an action against the parties affected, founded upon their assumption of the liabilities of others, and not by the summary process of a motion to insert their names as defendants, and thus to apply to them an adjudication previously made against the original debtors."[1] The soundness of this decision may well be doubted.

[1] Prouty *v.* Lake Shore &c. R. Co., 50 N. Y. 363, 368.

It seems to involve the conclusion that the right of a preference shareholder is merely a right in the nature of lien upon the particular property owned by the original company, in which he was such a shareholder, and that, upon the consolidation, it does not become a general obligation of the new company; for, if it does become such an obligation there is no sound reason why it should have the opportunity of relitigating the question of its duty to discharge it. The decision seems to involve the conception of a consolidation which does not consolidate, so far as the properties are concerned; and of a union which still continues to be a separation.

§ 405. Actions by Creditors of Old Company against New Company. — Where the statute of consolidation saves the rights of creditors of the old corporations, they may enforce such rights by a *direct action* against the new corporation.[1] There is also much authority to the effect that the new corporation will be liable in a direct action by a creditor of the old, although the statute of consolidation contains no express provision saving the rights of creditors of the old or giving such an action,[2] — a doctrine specially appropriate to *municipal* and other *public* corporations.[3] It is immaterial whether this right of action is supported on the ground that it is the case of a *promise* made between two parties, founded on a good consideration, for the *benefit of a third party*, which he may adopt and enforce, or whether it rests on the ground that the effect of the consolidation is not to dissolve the corporation which is his immediate debtor, but to continue its existence in the consolidated company. Reasoning upon this question, it

[1] Western &c. R. Co. *v.* Smith, 75 Ill. 496; Warren *v.* Mobile &c. R. Co., 49 Ala. 582; Mt. Pleasant *v.* Beckwith, 100 U. S. 514; Pullman Car Co. *v.* Missouri Pacific R. Co., 115 U. S. 581; Louisville &c. R. Co. *v.* Boney, 117 Ind. 501; *s. c.* 20 Northeast. Rep. 432; 3 Law Rep. Ann. 435. Speaking of this question in a late decision in Indiana, it is said by Mr. Justice Mitchell: "While it is an open question in some jurisdictions whether or not, in the absence of a statute, the debts of the original companies follow as an incident of the consolidation, and become *by implication* the obligations of the new corporation, it is settled in this State that the act of consolidation involves an *implied assumpsit* by the new company of all the valid debts and liabilities of the consolidated companies." Louisville &c. R. Co. *v.* Boney, 117 Ind. 501, 504; citing Indianapolis &c. R. Co. *v.* Jones, 29 Ind. 465; Columbus &c. R. Co. *v.* Powell, 40 Ind. 37; Jeffersonville &c. R. Co. *v.* Hendricks, 41 Ind. 48.

[2] Thompson *v.* Abbot, 61 Mo. 176.

[3] *Ibid.* (case of school district).

has been said that, "while the action might have been maintained against" the old company, "by service of process on the president of" the new company, "it might also have been necessary to bring a suit against the defendant to recover the assets. The law abhors circuity of action, and there is no good reason why the defendant, who has to pay, may not be directly sued."[1]

§ 406. **How Fact of Consolidation Averred.** — An averment in a complaint that certain railroad companies, authorized by law to consolidate, did consolidate and become one corporation under a certain name, has been held a sufficient averment of the consolidation, without setting forth in detail the steps taken by the different companies to effect the consolidation. The contrary course would make the pleading very prolix, and would impose a great burden on the pleader, who is presumed not to have access to the corporate records showing the various steps which were taken.[2] Besides, it would be proving facts which it is not even necessary to prove.[3] But where, in an action to foreclose a mortgage alleged to have been given by the defendants to a certain corporation, and by the corporation assigned to the plaintiff, there was a paragraph in the answer admitting that the mortgagee was a corporation at the date of the mortgage, but averring that, under the laws of Ohio and Indiana, it had consolidated with an Ohio company under a new name, and the terms of the consolidation were not given, nor the dates, nor the provisions of any statutes of Indiana or Ohio, — it was held that *no facts were set forth* upon which any legal question could be raised, and that so much of the answer was *void for uncertainty*.[4] Where an action is brought against a consolidated railway company, to recover damages for a *tort* alleged to have been inflicted by one of the precedent companies, the complaint should aver the fact of the tort having been inflicted by the precedent company, and it should also aver the fact of consolidation. But where the suit was brought against the united com-

[1] Warren v. Mobile &c. R. Co., 49 Ala. 582, 586; citing Ready v. Tuscaloosa, 6 Ala. 327.

[2] Collins v. Chicago &c. R. Co., 14 Wis. 492.

[3] *Ante*, § 306, *et seq.*

[4] Hubbard v. Chappel, 14 Ind. 601; citing Wright v. Bundy, 11 Ind. 398.

pany without these allegations in the petition, it was held not to entitle the company to a reversal of a judgment against it; for the variance could have been cured by an amendment on the trial, and was hence immaterial.[1]

§ 407. How Averment Replied to. — In *quo warranto* against a company, which pleads that it became a corporation by a contract of consolidation under a statute, a reply in the nature of a plea of *nul tiel record* has been held proper; but the defendants should have leave to *rejoin* that there is such a record with a *prout patet recordum*.[2] If, in support of this rejoinder, the defendant produce the agreement and act of consolidation, set forth in answer to the *oyer* craved by the attorney general, with evidence that the same was deposited with the Secretary of State, on a date prior to the commencement of the action, judgment will be given for the defendants.[3]

§ 408. Proof of the Consolidation. — Where the question of the fact of the consolidation is put in issue, it will ordinarily be proved by the same evidence which may be invoked to prove the existence of any corporation, — by proof of its charter, or certificate, or articles of incorporation, and of *user* thereunder.[4] As already seen, where a corporation is created under a general law, the fact of the executing and filing in the proper office of an instrument of incorporation is *prima facie* evidence of the existence of the corporation.[5] So, in an action against a corporation which has been created by the consolidation of other corporations, upon an application of one of the original companies, the ordinary evidence of the consolidation will be copies of the articles of consolidation on file in the office of the Secretary of State, duly certified by that officer and authenticated by his seal of office, in compliance with statutes which no doubt exist in all of the States, making certified copies of such public acts original evidence;[6] and also in compliance with the terms of

[1] Indianapolis &c. R. Co. *v.* Jones, 29 Ind. 465.

[2] Com. *v.* Atlantic &c. R. Co., 53 Pa. St. 9, 19.

[3] Com. *v.* Atlantic &c. R. Co., 53 Pa. St. 9, 19.

[4] *Ante*, § 220; *post*, Ch. 184, Art. III.

[5] *Ante*, § 220.

[6] Columbus &c. R. Co. *v.* Skidmore, 69 Ill. 566.

statutes of consolidation, examples of which have been given,[1] making copies of the instrument of consolidation certified by the Secretary of State, evidence of the fact in all courts.

§ 409. Effect of Dissolving Consolidation upon Judgments against Consolidated Company. — A case in Indiana presents the curious question, what will be the effect of a judicial decision declaring an attempted consolidation void and severing the two companies, upon judgments recovered against them by their consolidated name and in their united character; and it is held that, as the plaintiff in such an action is not a party to the action dissolving the consolidation, it has no effect upon his rights, but that, after the severance, his judgment stands substantially as a judgment against both companies, and that he may have an execution against either.[2]

§ 410. Binding Effect of Admission of One of the Precedent Corporations. — It has been held that an admission made by one of the precedent corporations, in a judicial proceeding to which it was a party, is binding upon the consolidated corporation. It was objected to evidence of such an admission that it was not made by the defendants in the case at bar, but by the Wilmington and Susquehanna Railroad Company, another corporation. "It is true," said Mr. Justice Curtis, answering the objection, "the action in the trial of which the admission was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington and Susquehanna Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington and Baltimore Company, were merged in and constituted one body corporate, under the name of the Philadelphia, Wilmington and Baltimore Railroad Company, it is very clear that, at the time the trial took place in Cecil County Court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington and Susquehannna Company, were done and made *by the same corporation* which now defends this action."[3]

1 *Ante*, § 306, *et seq.*

2 Ketcham *v.* Madison &c. R. Co., 20 Ind. 260.

3 Philadelphia &c. R. Co. *v.* Howard, 13 How. (U. S.) 307, 333.

CHAPTER X.

PROMOTERS.

ARTICLE I. LIABILITY ON THEIR CONTRACTS.

§ **415. Meaning of the Term "Promoter."** — The word "promoter" is used in England to designate persons who exert themselves in the formation of a company. "It is not a word of art; it must be understood by lawyers as it would by lay-

men."[1] The meaning of the word has come in England to be so commonly understood that it was held, in one celebrated case, that a judge in charging a jury, was not bound to *define* it to them.[2] At the same time, it was said that the word has no very definite meaning, but involves the idea of exertion for the purpose of floating a company, and also the idea of some duty towards the company imposed by, or arising out of, the position which the so-called promoter assumes towards it.[3] But, to bring a person within the meaning of the term, it is not sufficient to show that, at the time when the property was purchased, it was contemplated that a company should be formed for the purpose of acquiring it.[4]

§ 416. Personal Liability of Promoters on Contracts Made for a Projected Company. — In a future chapter we shall have occasion to examine the rule that where a contract is signed by a person professing to act as the agent of another, but who has no principal in existence at the time, so that the contract will be wholly inoperative unless binding upon the person who thus signed it, he will be personally liable upon it.[5] The rule is the same whether the courts proceed upon the idea of a breach of warranty of agency, or upon the idea that, in construing such an instrument, such meaning ought to be given to its terms as will save it from becoming wholly nugatory and inoperative — a thing which the parties could not be supposed to have intended. This principle applies with peculiar force to contracts made by the promoters of a company which they *intended* to organize, but which was not yet in existence at the time of the making of the contract. Of course, if the contract specifies that the obligee will not look to the promoters for payment or indemnity, but will take his chances of their succeeding in organizing the proposed company, and of the company ratifying the contract thus

[1] Bramwell, J., in Twycross *v.* Grant, 2 C. P. Div. 503. The learned justice also held that the word is not limited to persons acting before the company is formed, but might apply to those actively concerned in placing its shares. *Ibid.*

[2] Emma Silver Mining Co. *v.* Lewis, 4 C. P. Div. 396.

[3] *Ibid.*

[4] Ladywell Mining Co. *v.* Brookes, 35 Ch. Div. 400; *s. c.* 17 Am. & Eng. Corp. Cas. 22, 30.

[5] *Post,* § 2969, *et seq.*

made by them for it, then there is no room for controversy.[1] It must be confessed that even the English authorities on these questions are in confusion; but it is thought to be a sound course, in most of these cases, to put the question to the jury whether the plaintiff meant to contract on the footing of the personal liability of the defendant, either alone or as a member of the acting committee, or on the credit of the funds.[2] Obviously, the *question* will be one *of fact* for the jury, except where it involves the construction of a written contract, when it will be a question of law for the court. The effort of the courts in all these cases will be to give effect to the *intention* of the parties. Accordingly, if a person agrees with the promoters of a company to bear, himself, the expense of promoting it, he cannot recover such expense from the company when organized, although the act organizing the company contains the usual provision that the company shall pay the costs of the passing of the bill. The previous agreement inures to the benefit of the company.[3] Even if the company should in fact come into existence, it would not be bound by such a contract, though it is supposed a court of equity would not suffer it to retain an advantage thus acquired. "There must be two parties to the contract, and the rights and obligations which it creates can not be transferred by one of them to another person, who was not in a condition to be bound by it at the time it was made."[4]

§ 417. But Promoters Personally Liable although Contract Made in Name of Corporation.— As already seen,[5] the promoters are personally liable on such contracts, although they have assumed to make them in the name of the intended corporation as though it were actually in existence. In such cases

[1] Such was the contract in Landman *v.* Entwistle, 7 Exch. 632; *s. c.* 21 L. J. (Exch.) 208; Higgins *v.* Hopkins, 3 Exch. 163; *s. c.* 6 Ry. Cas. 75; 18 L. J. (Exch.) 113. Compare Thomas *v.* Edwards, 2 Mees. & W. 215.

[2] Higgins *v.* Hopkins, 3 Exch. 163; *s. c.* 6 Ry. Cas. 75; 18 L. J. (Exch.) 113.

[3] Savin *v.* Hoylake R. Co., L. R. 1 Exch., 9; *s. c.* 4 Hurl. & Colt. 67; 35 L. J. (Exch.) 52; 11 Jur. (N. S.) 934; 14 W. R. 109; 13 L. T. (N. S.) 374.

[4] Erle, C. J., in Kelner *v.* Baxter, L. R. 2 C. P. 174; *s. c.* Thomp. Off. Corp., p. 117.

[5] *Ante*, § 218.

the rule which estops persons who contract with an assumed corporation from subsequently denying its corporate character does not apply; but the obligee is allowed to go behind the assumed corporation and to hold the individuals responsible, on the theory of a *breach of warranty of agency*, — that is to say for the reason that they have held out to the obligee a contracting party which really does not exist and which is unable to answer to him in damages for the non-performance of the contract.[1] The theory is that those who assume to make contracts for a corporation impliedly warrant its existence as a body capable of contracting.[2] But the governing principle seems to be wider; for the theory of breach of warranty of agency would only charge with liability those who made the contract, or authorized it, or assented to it, or ratified it, in some more direct way than by purchasing shares in the supposed company; and in nearly all the decisions first cited the defendants were charged because they were *members*, and not merely because they were *promoters*, of inchoate or abortive corporations. A better ground is that exemption from personal liability is a *franchise* or *privilege*, which the State confers on adventurers on their complying with certain *conditions;* so that, if they organize themselves into an association and elect a board of officers to manage its affairs, and authorize them to make contracts for the common body, before they have complied with those conditions, they stand like the members of any other merely voluntary association in respect of personal liability. While a discussion of the personal liability of *stockholders*, as such, is reserved for a future portion of this work, it may be observed here, that the shareholders of an abortive or inchoate corporation cannot be charged with personal liability for its obligations, in any case, or on any theory, unless the nature and purposes of the association are such that they would be liable as partners if there were no pretense of

[1] Johnson *v.* Corser, 34 Minn. 355; *s. c.* 25 N. W. Rep. 799; Field *v.* Cooks, 16 La. Ann. 153; Abbott *v.* Omaha Smelting Co., 4 Neb. 416; Kaiser *v.* Lawrence Sav. Bank, 56 Iowa, 104; Garnett *v.* Richardson, 35 Ark. 144; Bigelow *v.* Gregory, 73 Ill. 197; Pettis *v.* Atkins, 60 Ill. 454; Hess *v.* Werts, 4 Serg. & R. (Pa.) 356; Eaton *v.* Walker, 76 Mich. 579; *s. c.* 43 N. W. Rep. 638; Hurt *v.* Salisbury, 55 Mo. 310; Hill *v.* Beach, 12 N. J. Eq. 31.

[2] Hurt *v.* Salisbury, *supra*, and other cases.

their being incorporated. Thus, where the purposes of the association are not for pecuniary gain and profit, but merely to secure the completion of a public work, *e.g.*, the extension and grading of a public street, the associates, in case it does not become incorporated, are not, *ipso facto*, liable as partners,— that is to say, there is no authority, implied from their relations, in one of the associates to bind the others by contracts incurring liabilities. In such a case, whether the associates will be bound will be a question of fact for a jury, or, in a suit in equity, for the chancellor, depending upon the circumstances of the case.[1]

§ 418. **Rule Applies in all Cases to Managers.**— Some courts have exhibited a reluctance to apply this principle so as to charge the innocent *stockholders* as *partners*, where the managing officers have entered upon the business of the corporation in violation of positive law, or without complying with some condition precedent enjoined by law; but no such reluctance has been felt as to the *managers*. "Where the entire business, carried on by persons in the name of a corporation, is such as the corporation is prohibited by law from doing, they cannot interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of the corporate name."[2] In such a case the managers may be held liable, on a theory which may not reach or affect the stockholders. That theory is the *breach of warranty of agency*. By professing to act for a corporation which does not exist, they put themselves in the position of a person who professes to act as the agent of another person who is really non-existent. Under a well settled rule, they are therefore personally bound to make good any undertaking which they assume in that character.[3] If they have been guilty of *fraud* in assuming to act for a non-existent corporation, they may become personally liable on another principle, which is that they who occasion injury to others by the fraudulent use of corporate powers, are personally liable in *damages* therefor.[4]

[1] Johnson *v.* Corser, 34 Minn. 355.

[2] Medill *v.* Collier, 16 Ohio St. 599, 613.

[3] Medill *v.* Collier, 16 Ohio St. 599, 613; Fay *v.* Noble, 7 Cush. (Mass.) 188.

[4] Medill *v.* Collier, 16 Ohio St. 599, 613; Bartholomew *v.* Bentley, 15 Ohio.

§ **419. Illustrations.**—The signers of the following promissory note were held liable on this principle:—

$1,000. SALISBURY, MO., Feb. 22, 1869.

"Twelve months after date, for value received, the undersigned, as directors of the North Missouri Central District Stock, Agricultural and Mechanical Association, promise to pay Peyton T. Hurt, or order, the sum of one thousand dollars, negotiable and payable without defalcation or discount, and with interest from date at ten per cent. per annum.

"LUCIUS SALISBURY,
"M. M. HURT,
"ELI WAYLAND,
"M. B. WILLIAMS,
"J. A. JOHNSTON,
"*Directors*.
"JAMES W. LEWIS,
"*as Directors*."

The note was thus signed and executed before the *articles* of association were *filed* with the Secretary of State, and consequently before the corporation had acquired a legal existence, and on this ground they were personally charged.[1] - - - - A banking corporation commenced business before complying with a statute, which prohibited such corporations from commencing business before *depositing* certain *securities* with the Auditor of the State. While so doing business, they received a deposit from the plaintiff, and afterwards made an assignment by reason of insolvency. It was held that the plaintiff could maintain an action against the *managers* to recover his deposit, and that they would not be heard to set up the defense that he might have an action against the corporation, in which the corporation would be *estopped* from pleading its want of compliance with the statute.[2] - - - - It has been held, in an action on an account brought against certain individuals, charging them as partners, in a partnership called the Register Smelting and Refining Company, in which they answered denying the partnership, but alleging that the company was a corporation,— that the *burden of proving the incorporation* rested upon the defendants, failing to establish which, the defendants could not avoid personal liability.[3] The question at issue was said to be, not so much whether the defendants held

659; Bartholomew *v.* Bentley, 1 Ohio St. 37; Vose *v.* Grant, 15 Mass. 505, 519; Trowbridge *v.* Scudder, 11 Cush. (65 Mass.) 83.

[1] Hurt *v.* Salisbury, 55 Mo. 310.

[2] Medill *v.* Collier, 16 Ohio St. 599.

[3] Abbott *v.* Omaha Smelting &c. Co., 4 Neb. 416.

themselves out as partners, but whether they were in fact members of the company which assumed to act as a corporation.[1]

§ 420. Theory that Rule not Applicable where there is a Corporation de Facto. — As already stated,[2] if the corporation never comes into existence, at least in such a sense as to be regarded in law as a *de facto* corporation, the promoters will be personally liable for any contracts which they have assumed to make in its behalf; and in applying this principle it has been held that the managing agents of a pretended corporation are so liable, where the circumstances are such that the corporation *could not have* existed at all, as where they are associated together under a void law.[3] On the other hand, the implication is that, where there is a corporation *de facto* — in other words, where the circumstances are such that a corporation *might* exist[4] — and where the party seeking to charge the members individually has dealt with them as a corporation, he is *estopped* from setting up the fact that they are not a corporation *de jure*, in order to charge them personally instead of charging that he agreed to trust, namely, their common fund.[5]

§ 421. English View that Promoters not Necessarily Liable as Partners. — The present doctrine of the courts of England is that persons who serve on provisional committees, appointed at public meetings or otherwise, for the purpose of getting up a company, are not *ipso facto* partners, so that one will be liable upon contracts made by the others, although special facts may exist which will make them liable as such.[6] The reason of the

[1] *Ibid.*

[2] *Ante*, § 417.

[3] Eaton *v.* Walker, 76 Mich. 579; *s. c.* 43 N. W. Rep. 638.

[4] *Post*, § 505.

[5] *Post*, §§ 505, 2992.

[6] Reynell *v.* Lewis, 15 Mees. & W. 517; *s. c.* Thomp. Off. Corp., p. 121; Bailey *v.* Macaulay, 13 Q. B. 814; *s. c.* Thomp. Off. Corp., p. 136; Forrester *v.* Bell, 10 Ir. Law Rep. 555; Landman *v.* Entwistle, 7 Exch. 632; *s. c.* 21 L. J. (Exch.), 208; Higgins *v.* Hopkins, 3 Exch. 163; *s. c.* 6 Ry. Cas. 75; 18 L. J. (Exch.) 113; Carrick's Case, 1 Simons (N. S.), 505; Newton *v.* Belcher, 12 Q. B. 921; Ex parte Cottle, 2 Mac. & G. 185; Robert's Case, 2 Mac. & G. 192 (affirming *s. c.* 3 DeG. & Sm. 205); Wood *v.* Argyll, 6 Man. & G. 928; Norris *v.* Cottle, 2 H. L. Cas. 647; Burnside *v.* Dayrell, 3 Exch. 224; *s. c.* 6 Ry. Cas. 67; 19 L. J. (Exch.) 46 (overruling Barnett *v.* Lambert, 15 Mees. & W. 489). See the observations of Lord Brougham in Norris *v.* Cottle, 2 H. L. Cas. 665. The cases of Holmes *v.* Higgins, 1 Barn. & Cres. 74; Lucas *v.* Beach, 1 Man. & G. 417, and Hutton *v.* Upfill, 2 H. L. Cas. 691, are overruled on this point.

rule is said to be that a partnership is not created by an agreement to organize a future partnership.[1]

§ 422. **This View Further Explained and Illustrated.** — The mere fact of a person agreeing to become a member of the provisional committee of an intended corporation has been held, in that country, to amount to no more than a promise that he will act with other persons, appointed or to be appointed, for the purpose of carrying the scheme into effect. Therefore, in an action against a provisional committee-man for goods supplied on the order of the solicitor of the company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of the committee, an authority from him to the other members of it to make contracts by himself or by the solicitor, nor an authority to the solicitor to make them on behalf of the committee, such as would make each committee-man liable as a partner.[2] If the party not only consents to be a provisional committee-man, but authorizes his name to be inserted and published in a prospectus, which merely states the names of the members of the provisional committee, and nothing more, that fact does not alter the liability. If it states the names of an acting or managing committee also, it is a question for a jury whether it means that the latter are to take upon themselves the whole management of the concern, or that the former have constituted the latter their agents to manage it on their behalf, — in which case the former would be liable for the contracts of the latter. Or, if the solicitor's name were mentioned in it, the question for the jury would be whether it meant that he was to be employed by those of the committee who acted, or that he was already appointed by all whose names were mentioned, as their solicitor, to do all solicitor's work on their behalf; and further, what was the business then usually transacted by solici-

[1] Forrester *v.* Bell, 10 Ir. Law Rep. 555; 1 Lindl. Part. 1st. ed. 31. See to the general question, Fox *v.* Clifton, 6 Bing. 776; *s. c.* 9 Bing. 115, and Bourne *v.* Freeth, 9 Barn. & Cres. 632; Fay *v.* Noble, 7 Cush. Mass. 188. It is upon this ground that an allottee of shares in an abortive company is not a contributory. There never was a contract of partnership on his part, but only an agreement to become a partner in case the company should be formed under an act of Parliament. Hutton *v.* Thompson, 3 H. L. Cas. 161.

[2] Reynell *v.* Lewis, 15 Mees. & W. 517; *s. c.* Thomp. Off. Corp. 121.

tors in such undertakings, on behalf of the company; and the same as to the secretary.[1] Where there is also evidence that the defendant has *acted* with relation to the proposed scheme, it is a question for the jury whether, by his consent and acts, he has authorized the solicitor, or secretary, or any member of the committee, to pledge his credit for the necessary and ordinary expenses to be incurred in forming such a company; and if so, whether the work was done and the credit given on the faith of his being liable. Such an intended association does not constitute a partnership, inasmuch as it constitutes no agreement to share any profit or loss.[2]

§ 423. Character in which Liable a Question of Fact. — The English doctrine, then, is that the character in which a member of a provisional committee of a projected corporation is liable, upon contracts for work and labor, etc., is a *question of fact* for a jury.[3] Thus, in an action against a member of the committee of a projected railway company for work and labor done, goods supplied and money paid, the jury are to consider whether the defendant, by taking upon him the character of a committee-man and afterwards acting in the affairs of the company, has authorized the company's solicitor or secretary, or any member of the committee, to hold him out to the world as personally responsible for the reasonable and necessary expenses incurred in forming such a company on its behalf; and then, whether the credit was given on the faith of his being so personally responsible.[4] Such a committee-man, by merely allowing his name to appear in that character, in the ordinary form of prospectus issued by English railway companies, incurs no liability to a tradesman who supplies goods to the company; but the consent of a person to his name so appearing might be a fact of importance on a question of such liability, as showing that he took an interest in the proposed concern: whether merely as a patron and well-wisher, or as co-operating in the measures preparatory to its formation. It became, therefore, material to know what the

[1] *Ibid.*

[2] *Ibid.*

[3] Reynell *v.* Lewis, 15 Mees. & W. 517; *s. c.* Thomp. Off. Corp. 121; Bailey *v.* Macaulay, 13 Ad. & El. (N. S.) 815; *s. c.* Thomp. Off. Corp. 136.

[4] Bailey *v.* Macaulay, 13 Ad. & El. (N. S.) 815; *s. c.* Thomp. Off. Corp. 136.

committee-man was doing when he joined it, and whether he knew what it was doing, and concurred therein. If advertising, printing and stationery were necessary to the working of the committee, and no fund had been raised to pay for such necessaries, the tradesman might justly suppose that all who acted on the committee had authorized him to supply them on their credit, although the individual committee-man had not specifically given such authority, and although the tradesman might know nothing more of the committee-men than that they were probably men of character and substance. The absence of the committee-man's *intention* to pledge his credit was deemed immaterial, if he had given the authority beforehand.[1] If, however, the tradesman looked solely to the *deposits* on shares as the fund from which payment was to be made to him, he had no cause of action against the committee-man.[2] As the liability of the committee-man arose, not from his filling that character, but from his authorizing the orders for the goods or services, his admission of general liability might be evidence of his having authorized such orders before his name appeared on the committee.[3] In such a case the jury were to consider whether such an admission was made because the actual liability in law was questionable, and for the purpose of preventing litigation, or whether the admission was referable to his conscientious conviction that his acts had made him personally liable. In the latter case, they might infer his general liability.[4]

§ **424. Liable when Signing as "Agent."** — But even under the English rule, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it; and a stranger cannot, by a subsequent ratification, relieve him from the liability.[5]

§ **425. Illustrations of the English Rule.** — In an English case, one J., acting as solicitor and secretary of a projected railway com-

[1] *Ibid.*

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] Kelner *v.* Baxter, L. R. 2 C. P. 174; *s. c.* Thomp. Off. Corp. 106; *post,* Ch. 108.

pany, by the authority of the promoters, and by means of a check signed by two of them, obtained from the plaintiff an advance of £500, to be applied in payment of the parliamentary fees which would be necessary to get an act passed authorizing the proposed railway. This advance was obtained upon an express agreement that it was to be repaid "out of the calls on shares." An act authorizing the construction of the railway was passed, the promoters being named therein as first directors. At a meeting subsequently held the directors passed a resolution that the acts of J. should be adopted and confirmed. No shares were allotted or calls made, and the undertaking was not proceeded with. It was held, on the grounds just set forth, that the advance was made upon the responsibility of the persons who signed the check, and that the subsequent adoption of their acts by the directors did not alter their position.[1] - - - - In a still earlier case, the secretary of a local committee of a projected railway brought an action for his salary against a member of the committee who became such after the secretary was appointed. Alderson, B., told the jury, in summing up, that the members of the committee were the persons to whom the plaintiff was entitled to look for the payment of his salary, in the absence of an agreement that he was to look anywhere else, — as, for instance, to moneys which might be paid in as deposits or installments on shares; and, it appearing that the defendant was not a member of the committee at the time the plaintiff was first engaged as secretary, but became so while the plaintiff continued secretary, it was held a question for the jury whether the defendant did not continue to employ the plaintiff upon the same terms as those upon which he was first engaged.[2]

§ 426. Promoters not, as Such, Contributories. — In the winding up of an English *joint stock company*, in which all the members are liable as partners, all the members of the firm or company are liable to be placed on what is termed the list of contributories, that is, they are liable to contribute to raise a fund for the payment of its debts.[3] The rule that promoters or

[1] Scott *v.* Lord Ebury, L. R. 2 C. P. 254.

[2] Kerridge *v.* Hesse, 9 Car. & P. 200. What if the services rendered to the committee by an engineer, in making an estimate of the expense of the enterprise, are of no value, or only of partial value. Moneypenny *v.* Hartland, 2 Car. & P. 378; *s. c.* 1 Car. & P. 352.

[3] In the winding up act, 1848, under which the decisions here quoted arose, it is expressed that the word "contributory" shall include "every member of the company, and also every other person liable to contribute to the payment of any of the debts, liabilities or losses thereof."

provisional committee-men are not partners, necessarily excludes them from the list of contributories, unless they have agreed to be personally liable for the expenses of the concern. Where one has joined a provisional committee of a projected company, with the express stipulation that he shall not be liable for such expenses, it is obvious that he will not, on winding up the concern, be a contributory; they must make up the purse to pay the debts who agree to be liable for them, not he.[1] If one member of such a committee, in furtherance of the common object, incurs liabilities, he must pay those liabilities himself, and he will not be entitled to contribution from the others. In the absence of special circumstances,[2] such a committee-man would not be liable at law for such expenses, not directly authorized by himself or his agent; and when called upon in a court of equity to contribute for the indemnity of a co-committee-man he is held exempt from liability on the same ground. In this respect equity follows the law.[3] The parallel between the rule of equity and that of law extends further. It has already been shown [4] that the question whether one provisional committee-man or promoter is liable upon contracts made by his co-committee-men or promoters, is one of fact, not of law. The same rule is applied in equity. In the opinion of the judges to the lords in the leading case of Bright *v.* Hutton,[5] Mr. Baron Parke said: "All the questions of contributories resolve themselves into two simple questions of fact: 1. (by far the most frequent in occurrence) Did the alleged contributory make, or authorize to be made, the contract in respect of which he is called upon to contribute, on his account jointly with others? or, 2. If any one or more entered into the contract in his own, or their behalf, did he

[1] Roberts' Case, 3 DeG. & Sm. 205 (affirmed, 2 Mac. & G. 192).

[2] See § 429, *post.*

[3] Norris *v.* Cottle, 2 H. L. Cas. 647. This case was argued before and decided by Lord Brougham, the only law lord in town. The point actually decided was that one who had consented to have his name inserted in the list of provisional committee-men of a proposed railway company which was provisionally registered, and whose name was so inserted and advertised, but who did not expect to apply for shares, or attend any meeting of the committee, did not — the undertaking having been abandoned — become liable as a contributory under the Winding-Up Acts of 1848 and 1849; but the general principles laid down fully sustain the text.

[4] *Ante*, § 416.

[5] 3 H. L. Cas. 341, 369.

agree to indemnify the person or persons contracting in part or in all against the consequences of that contract?" This view was adopted by the lords, and in so doing they were obliged to overrule the judgment of Lord Brougham in Hutton *v.* Upfill,[1] though they endeavored to avoid doing so directly.

§ 427. **Further of the English Rule.**— There is still another view of the liability of this class of promoters. The provisional committee of a projected company is one thing, and the company itself, when formed, is another. Being a member of a provisional committee of a company does not at all make a person a member of the company. A man may actively interest himself in building a railway in his neighborhood, and yet take no shares in the company and not be liable for any of its debts. On the other hand, he may, by contract, make himself liable for the expenses incurred in floating the company. But these would be debts of the committee, or of individual members of it, and not debts of the company, unless the company

[1] 2 H. L. Cas. 674. To the same effect is Carrick's Case, 1 Simon (N. S.) 505. In his very able work on Partnership (4th ed. vol. 2, p. 1375), Sir Nathaniel Lindley, enumerates the following cases as being overruled, directly or indirectly, by Bright *v.* Hutton, 3 H. L. Cas. 341: "Upfill's Case, 2 H. L. Cas. 674; Ex parte Besley, 2 Mac. & G. 176. This case occurs three times in the books. It was first decided by Vice-Chancellor Knight Bruce (3 DeG. & S. 224), who held that Besley was not a contributory. This decision was appealed against and reversed by Lord Cottenham (2 Mac. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the Vice-Chancellor (3 Mac. & G. 287). The case as reported in 3 DeG. & S. 224, and 3 Mac. & G. 287, is still law. Bright's Case, 1 Sim. (N. S.) 602. This was reversed on appeal (3 H. L, Cas. 341). Ex parte Brittain, 1 Sim. (N. S.) 284, decided reluctantly on the authority of Upfill's Case. Hole's Case, 3 DeG. & S. 241, decided on the authority of Ex parte Besley, 2 Mac. & G. 176. Markwell's Case, 5 DeG. & S. 528, decided on the authority of Upfill's Case, but after the decision of Bright *v.* Hutton. It cannot, however, be considered law. See Ex parte Capper, 1 Sim. (N. S.) 178, and Carrick's Case, 1 Sim. (N. S.) 505. Ex parte Morrison, 15 Jur. 346, and 20 L. J. Ch. 296, decided on the authority of Upfill's Case, and in effect overruled by Sharp & Jenner's Case, 1 DeG. M. & G. 565. Nicholay's Case, 15 Jur. 420, decided on the authority of Upfill's Case. Ex parte Sichell, 1 Sim. (N. S.) 187, decided reluctantly on the authority of Upfill's Case. Ex parte Studley, 14 Jur. 539. This case was very briefly reported, but it seems inconsistent with such cases as Hall's (3 DeG. & S. 214), Stocks (22 L. J. (Ch.), 218), and Carrick's (1 Sim. (N. S.) 505."

had, by ratification (creditors assenting) made itself liable for them. Until the debt is so assumed by the company, with assent of the creditor, it remains the debt of the committee, or of the members of the committee who contracted it, and not its debt. For this reason provisional committee-men do not, on the winding up of the company, go on the list of its contributories, although they might well be contributories on the winding up of the committee.[1]

§ 428. The English Doctrine Summed up by Sir Nathaniel Lindley. — Sir Nathaniel Lindley, whose work is entitled to the very highest consideration, thus sums up the doctrine of the English courts on this subject:[2] "Upon the principles which are now settled to be applicable to the case of an abortive unregistered company, it may be taken: 1. That a mere subscriber to or allottee of scrip in an abortive company is not, by virtue of his subscription, or acceptance of scrip, a contributory on the winding up of the company, whether he has paid his deposit[3] or not.[4] 2. That such a person does not become a contributory by being one of the committee from which the scheme emanates, and by which it is encouraged; or, in other words by being what is commonly called a promoter of the company.[5] This holds, even although he may have subscribed something towards

[1] Besley's Case, 3 DeG. & S. 224. Though this case was overruled by the Lord Chancellor (2 Mac. & G. 176), nothing was said impugning in any way the force of the observations of Vice Chancellor Knight Bruce, which we have in substance embodied in the text. The reversal was upon the ground that Besley had recognized his liability, and had, without compulsion and with his eyes open, made a payment towards liquidating the expenses of the company. Besides the case was reheard by Lord Truro, who reaffirmed the judgment of the Vice Chancellor. 2 Mac. & G. 287.

[2] 2 Lindley on Partnership, 1376–7, 4th ed.

[3] As in Maudslay and Field's case, 17 Sim. 157; Ex parte Beardshaw, 1 Drew. 226. See, too, Ex parte Walstab, 20 L. J. (Ch.) 58, where the deposit had been paid and recovered back.

[4] As in Hutton *v.* Thompson, and Norris *v.* Cooper, 3 H. L. Cas. 161; Ex parte Capper, 1 Sim. (N. S.) 178; Carrick's case, *Ib.* 505; Ex parte Hirschel, 15 Jur. 942.

[5] Bright *v.* Hutton, 3 H. L. Cas. 341, reversing Bright's case, 1 Sim. (N. S.) 602; Norris *v.* Cottle, 2 H. L. Cas. 647, affirming Ex parte Cottle, 2 Mac. &. G. 185. See, too, Maitland's Case, 3 Giff. 28; Ex parte Roberts, 2 Mac. & G. 192 and 14 Jur. 539, note; Ex parte Clarke, 20 L. J. (Ch.) 14.

the expenses, if he do so under the erroneous supposition that he was liable for them,[1] or merely for the sake of peace;[2] so, although he may have concurred in the appointment of persons, and have incurred liability by so doing, if all liability on that score is at an end;[3] so, although he may have been party to the appointment of a managing committee, by which debts still unpaid have been incurred;[4] so, although his name may have been put on that committee, if he never assented to join it, and never acted on it.[5] 3. That, *a fortiori*, subscribers to and promoters of an abortive company are not, as such, liable to be made contributories on its winding up, if they never have, in fact, entered into a binding agreement to take shares. Even before Upfill's Case was reversed, this proposition was well established.[6] 4. That if persons are actively engaged in forming a company, if they act as a body, and as a body incur debts for which they are all liable, if not directly, at all events as between each other, then they form a company or association which may be wound up, and on its winding up they will be contributories, whether they have actually subscribed for shares or not.[7] 5. That persons who, without being actively engaged in forming a company, agree not only to take shares in it, but also to share the expenses incurred in forming the company, are, on its winding up, liable to be made contributories."[8]

§ 429. No Action at Law by One Promoter against the Others.— It is familiar law that one partner cannot maintain an action *at law* against one or more or all of his co-partners for

[1] Ex parte Besley, 3 Mac. & G. 287, affirming Besley's Case, 3 DeG. & S. 224; Hall's Case, 3 DeG. & S. 214.

[2] Ex parte Stocks, 22 L. J. (Ch.) 218; Hall's Case, 3 DeG. & S. 214; Carrick's Case, 1 Sim. (N. S.) 505; Ex parte Roberts, 1 Drew. 204; Tanner's Case, 5 DeG. & S. 182.

[3] Carrick's Case, 1 Sim. (N. S.) 505; Ex parte Hight, 1 Drew. 485.

[4] Tanner's Case, 5 DeG. & S. 182.

[5] Ex parte Roberts, 1 Drew. 204. See, too, Ex parte Osborne, 15 Jur. 72. Compare Spottiswoode's Case, 6 DeG. M. & G. 345.

[6] See Matthew's Case, 3 DeG. & S. 234; Carmichael's Case, 17 Sim. 163; and Onions's Case, 1 Sim. (N. S.) 394.

[7] Norbury's Case, 5 DeG. & S. 423; Sharp and James' Case, 1 DeG. M. & G. 565; Pearson's Executors' Case, 3 DeG. M. & G. 241; Spottiswoode and Amsinck's Case, 6 DeG. M. & G. 345. See also Bowen & Martin's case, 22 L. J. (Ch.) 856, and Ex parte Apps, 18 L. J. (Ch.) 409.

[8] See the last note.

anything due him on account of the partnership business. The remedy is in equity.[1] It was formerly held in England that if a number of persons associate themselves together for the purpose of promoting a corporation on the terms that each is to have an interest in it, they become partners in the enterprise; and if one of them give his services in furtherance of the common object and the others fail to indemnify him, he cannot maintain an action at law against one of them — for instance, against the chairman of the committee — for such indemnity. If, however, the defendant personally undertook to pay the plaintiff, the result would, of course, be different.[2] Accordingly, where a solicitor had rendered services at the request of the committee of a company organized for building a bridge, had taken shares in the company, not in his own name, but in the name of a man of straw, whom he had procured to act for that purpose, it was held that he could not recover at law in an action against the chairman of the committee for the value of his services, for the reason that he really was a partner in the concern.[3] But one who had entered into a contract to perform work and furnish materials with a committee associated together for the purpose of obtaining an act of Parliament for making a turnpike road, was not precluded from maintaining such an action by the fact that, subsequently to such contract, he became a shareholder in the company; though it would prevent him from recovering for the valne of any services rendered subsequently to the time when he became a shareholder.[4] So, if a person who is an inventor of a scheme, gets gentlemen to act as a committee, with the intention of forming a joint-stock company to carry it into effect, and he himself acts as secretary to the committee, he cannot maintain an action against one of the committee for his services as such secretary, or for his trouble, or for journeys which he undertakes in furtherance of the execution of the scheme, unless upon express evidence that the member of the committee whom he sues, employed him.[5] The

[1] Milburn *v.* Codd, 7 Barn. & Cres. 419; *s. c.* 1 Man. & Ry. 238.

[2] Holmes *v.* Higgins, 1 Barn. & Cres. 74; *s. c.* (a better report) 2 Dow. & Ry. 196; Goddard *v.* Hodges, 3 Tyrwh. 209; *s. c.* 1 Cromp. & Mees. 33; Wilson *v.* Curzon, 5 Ry. Cas. 24.

[3] Goddard *v.* Hodges, *supra.*

[4] Lucas *v.* Beach, 1 Man. & G. 417.

[5] Parkin *v.* Fry, 2 Car. & P. 311.

reader must continually bear in mind, in considering these earlier English cases, that they related, not to full corporations, but to *joint-stock companies*, which were *partnerships*. For instance, the doctrine in a case above cited[1] would not apply to an American corporation; for such a corporation is so far distinct from each of its stockholders that there is no obstacle, even in a court of law, to an action by the stockholder against the corporation, to recover money advanced to, or the value of services rendered for it. The reader will also note that the English courts subsequently settled upon the rule that persons do not make themselves *partners* by the mere act of joining together to organize a *corporation*.[2]

§ **430. Unless under Exceptional Circumstances.** — From what has preceded, it is obvious that special circumstances may exist under which one promoter of an abortive company will be entitled to maintain an action against the others for *contribution*. Thus, if promoters have, by special agreements, among themselves, rendered themselves jointly liable, and, in order to discharge this liability one of them has paid the whole debt, he will be entitled to contribution from the others.[3] Thus, A., B. and C. hired premises of D., for the purpose of a company, of which A., B. and C. were the contract committee-men. The company having suffered the rent to get in arrear, D. sued and recovered it of A. It was held that A. could maintain separate actions at law against B. and C. for contribution.[4] Again, twelve provisional committee-men became jointly liable for a debt contracted in respect of the scheme. One of them having paid the whole debt, it was held that he was entitled to maintain actions at law against the others. The measure of his recovery against each was an aliquot part of the sum of money he had been compelled to pay, in respect of the original number of the joint undertakers, without reference to the number of them liable at law at the time of payment. Accordingly, although two of them had died, he could recover against each of the survivors but one-twelfth, and not one-tenth, of the sum he had paid.[5] Again, where a party had

[1] Lucas *v.* Beach, *supra*.

[2] *Ante*, § 421.

[3] 2 Lindley on Partnership, 1022, 4th ed.

[4] Boulter *v.* Peplow, 9 C. B. 493.

[5] Batard *v.* Hawes, 2 El. & Bl. 287. See to the same effect, Edger *v.* Knapp, 7 Jur. 583.

incurred and paid *costs*, in bringing actions against committee-men to recover the amount of his claim, at the request of another committee-man, it was held that he might recover such cost from the committee-man at whose instance he sued, under the *common count* for money paid.[1] Of course, a promoter may make himself liable to another by express contract; and such contracts have frequently been before the courts. A contract for the payment of money when an incorporated company, which the parties propose to form, shall be organized, requires a legal incorporation before the money can be considered due. The condition is not satisfied by any proceedings or arrangements preliminary to filing the certificate directed by the statute; nor can the courts sustain an action upon such agreement, commenced before such filing, upon the ground that, in virtue of any inchoate arrangements, the parties are to be deemed a corporation *de facto*, as among themselves.[2]

§ 431. Liability of Committee-man Subsequently Joining. — From the rule that provisional committee-men are not liable as partners, it would seem to follow, as a matter of course, that one who joins such a committee would not be bound by contracts entered into by its members before his joining, although such contracts were in part executed subsequently to that time; and it has been so held.[3] Even an incoming partner would not be so bound, unless the circumstances were such as to indicate an adoption of the contract made by the prior partners — as where a firm of carriers enter into a contract for the carriage of goods which is in part executed after the incoming of another partner.[4] Accordingly, where it appeared that the defendants were members of a provisional committee which had entered into a certain contract with the plaintiff for the supply of certain machinery before M., another defendant, had joined the committee; that, under this contract, the plaintiff was to have

[1] Bailey *v* Macaulay, 13 Ad. & El. (N. S.) 815; *s. c.* Thomp. Off. Corp. 136.

[2] Childs *v.* Smith, 55 Barb. (N. Y.) 45, 53.

[3] Beale *v.* Mouls, 10 Q. B. 976; *s. c.* 5 Ry. Cas. 105; 11 Jur. 845; 16 L. J. (Q. B.) 410.

[4] Helsby *v.* Mears, 5 Barn. & Cres. 504. Compare Woods *v.* Russell, 5 Barn. & Ald. 942; Story on Part., § 152.

monthly payments on account of the work while in progress, not exceeding the price of the work done and materials supplied for the time being; that, after M. joined the committee, several payments were made on account of the work, and several alterations were made in the work with his sanction; and that he took an active part in superintending the work and making experiments with it;— it was held that M. was not liable to the plaintiff, either upon the special contract, or upon a common count for goods sold and delivered. If the property, in the successive portions of the machinery, passed from time to time by the payments on account while the work was in progress, it passed according to the terms of the special contract, to which M. was not a party.[1]

§ 432. Members of Provisional Committee not Liable for Contracts of Managing Committee. — During the era of railway building in England, the business of promoting or organizing railway companies, assumed a somewhat definite form. Without undertaking to state in detail the process which was generally gone through, it may be said that the first step was to raise a *provisional committee.* After the scheme had somewhat crystallized, this provisional committee appointed what was termed a *managing committee.* This managing committee necessarily incurred expenses; and when the scheme became abortive, and there were no corporate funds out of which these expenses could be paid, it became a question what person should pay them. It was held that the provisional committee was not, *ex vi termini*, responsible for expenses incurred by the managing committee.[2] The managing committee were not the agents of the provisional committee, but of the future company.[3] In actions against a

[1] Beale *v.* Mouls, *supra.* Compare Whitehead *v.* Barron, 2 Mood. & Rob. 248; Maudslay *v.* LeBlanc, 2 Car. & P. 409, *n;* Ex parte Peele, 6 Ves. 602; Ex parte Jackson, 1 Ves. Jr. 131; Clarke *v.* Spence, 4 Ad. & El. 448.

[2] Williams *v.* Piggott, 2 Exch. 201.

[3] Where the provisional committee appointed a managing committee of eight persons, and directed them to take the most energetic measures for carrying on the scheme, but the resolution did not authorize any less number than the whole of the committee to act, a provisional committee-man was not bound by a contract made by six of such managing committee, in the absence of proof of an intention on his part to be bound by a less number than the whole. Brown *v.* Andrew, 13 Jur. 938; *s. c.* 18 L. J. (Q. B.) 153.

member of the provisional committee, on a contract entered into by the managing committee, it was a *question of fact* for the jury, whether the provisional committee, in appointing the managing committee, gave them power to pledge the credit of the members of the provisional committee.[1]

§ **433. Judgment and Satisfaction against One may be Pleaded in Abatement by Another.** — If judgments are obtained in separate actions against persons who are jointly liable, for the same subject-matter, a satisfaction of one judgment is, in effect, a satisfaction of both.[2] If, therefore, separate actions are brought against several committee-men of a projected corporation upon a demand for which they are jointly liable, and, pending such actions, one of them pays the whole debt and the costs in the suit against himself, the others will be entitled to have the proceedings against them stayed, without payment of costs.[3] "A plaintiff who, to multiply his chances of success, brings several actions for a joint debt against the co-contractors, has no reason to complain, if his success in obtaining payment of the debt and costs in one, deprives him of the right to recover costs in the other actions."[4] Joint contractors are entitled, under this rule, to be discharged without payments of costs, even after verdict; if judgment against them has not been signed. Nor does it make any difference that separate evidence may be necessary to establish the joint liability of each of the committee-men separately sued; for it frequently happens, where actions on joint contracts are brought against several, that it is necessary to establish the case against each by separate evidence.[5]

§ **434. Evidence to Charge Committee-men.** — In order to charge a member of such a committee, it is, therefore, necessary to show that the contract on which he is sought to be charged was his personal contract, entered into by him in person or by

[1] Williams *v.* Piggott, 2 Exch. 201; *s. c.* 5 Ry. Cas. 544; 12 Jur. 313; 17 L. J. (Exch.) 196.

[2] Turner *v.* Davies, note (1), 2 Wms. Saund. 148, 148a, 6th ed.; Bailey *v.* Haynes, 15 Ad. & El. (N. S.) 533, 539.

[3] Newton *v.* Blunt, 3 C. B. 675.

[4] Bailey *v.* Haynes, 15 Ad. & El. (N. S.) 533, 538, *per* Lord Campbell, C. J.

[5] Bailey *v.* Haynes, 15 Ad. & El. (N. S.) 533.

some one thereto authorized by him. When we say expressly authorized by him, we mean that the term shall be understood in its legal sense, merely distinguishing the case from one where the law arbitrarily implies the party's assent to the contract, — as that a husband shall pay for necessaries purchased by his wife, or a father for those purchased by his minor child. It is not to be inferred from the expression used that, in order to charge the defendant, there must be evidence of a contract in writing, or even one made by express words. A man may speak by his *conduct* as effectively as by words or writings. Therefore, the liability of a committee-man on a contract made by some other members of the committee, may be proved by his acts alone. A wide field of inquiry is thus opened up, as to what acts of such a committee-man will constitute evidential facts to be considered by a jury on the question of his liability on contracts made by other members of his committee, or by a sub-committee appointed by the committee of which he was a member; and, further, what acts will be sufficient evidence, as matter of law, to entitle the plaintiff to recover. Upon these points the cases of Reynell *v.* Lewis,[1] and Bailey *v.* Macaulay,[2] are very instructive. The fact that such a committee-man attended a meeting at which a resolution to incur certain expenses was passed, will obviously be sufficient to charge him, unless it appear that he dissented from the resolution. On the other hand, where a member of such acommittee had left the room, before the passage by such committee of a resolution by which the members of the committee incurred certain liability, it was held that he was not bound to contribute towards the liquidation of such liability.[3] A member of such a committee, who takes part in its affairs so as to make himself individually liable for contracts on a given day, does not thereby make himself liable for services rendered after that time, where the order was given before it.[4]

[1] 15 Mees. & W. 517; *s. c.* Thomp. Off. Corp., p. 121.

[2] 13 Ad. & El. (N. S.) 815; *s. c.* Thomp. Off. Corp., p. 136.

[3] Robert's Case, 3 DeG. & S. 205 (affirmed, 2 Mac. & G. 192); Besley's Case, 3 DeG. & S. 224; *s. c.* 2 Mac. & G. 176, and 3 Mac. & G. 287.

[4] Newton *v.* Belcher, 12 Q. B. 921; *s. c.* 6 Ry. Cas. 38; 13 Jur. 253; 18 L. J. (Q. B.) 53.

§ 435. **Illustrations.** — In Riley *v.* Packington,[1] the defendant was associated with one Whitehead and others in the formation of a public company. At a meeting of the projectors, of which the defendant was chairman, a resolution was passed that the prospectus then read and marked with the initials of the defendant, be approved and printed for private circulation. At a subsequent meeting, of which also the defendant was chairman, a further resolution was passed "that the prospectus, as altered and marked with the chairman's initials, be approved as the prospectus of the company, and that the same be printed for circulation and advertised, at the discretion of Mr. Whitehead, as early as possible." The plaintiffs were employed by Whitehead to print the prospectus, who showed them the initialed copy, saying that he was authorized by the defendant to get it printed. The printed prospectus was delivered at the office of the company, and was adopted and circulated by the defendant. There was an arrangement, not communicated to the plaintiffs, between the defendant and Whitehead, that all the expenses of forming the company, down to the allotment of shares, were to be born by Whitehead. These facts were held to be *some evidence* from which a jury might infer that Whitehead was authorized to pledge the defendant's credit for the printing. - - - - In a case decided before the law had become settled in Reynell *v.* Lewis,[2] it appeared that a preliminary association was formed for the purpose of establishing a joint-stock company, of which A. was named president, and B. vice-president. They both signed an agreement to subscribe for a certain number of shares, and to pay a deposit of £5 per share when shares to the amount of £50,000 should have been subscribed for; and they attended two meetings of the association. The company was never in fact formed. At the request of the secretary of the proposed company, C. did certain work for it. In an action by C. against A. and B., it was held that the jury were properly told to consider (1), whether there had been a direct contract by A. and B. with C.; (2), whether A. and B. were members of a partnership; (3), whether they had held themselves out as such to C.[3] - - - - Where it was proved that A. had contributed to the funds of a building society, had been present at a meeting of the society, and a party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building these houses, without proof that he had any actual interest in them or in the soil on which they were built.[4] - - - - On the other hand, it has been ruled that a member

[1] L. R. 2 C. P. 536.

[2] 15 Mees. & W. 217; *s. c.* Thomp. Off. Corp. 121.

[3] Wood *v.* Duke of Argyll, 6 Man. & G. 928.

[4] Braithwaite *v.* Skofield, 9 Barn. & Cres. 401.

of a voluntary association formed for building a meeting-house, who is appointed one of the building committee, and acts as such in making contracts and procuring materials for building, is not individually liable to pay for services for which he thus contracts with one who knows his agency, and who knows that the contract is for the benefit of the association, and that it is entered into by the defendant merely as such agent.[1] - - - - A company was projected to work a patent for the filtration and supply of water. Whilst the bill for the formation of the company was before the House of Commons, the engineer, upon the suggestion of counsel, employed a builder to erect a cistern for testing the process of filtration, for which the patent had been granted. The defendant was one of the provisional committee, and the cistern was, with his consent, erected on land in his occupation. This was held *no evidence* to warrant the jury in finding that the order for the work was given by the defendant's authority, or that the work was done upon his credit.[2] The fact that a provisional committee-man has *admitted* his liability to pay for certain services rendered for the company is *not conclusive* of his liability, especially where it appears that unfounded opinions were at the time prevailing respecting the liability of provisional committee-men.[3] On like grounds, a person who had attended a meeting of the provisional committee, of a provisionally registered railway company, but took no part in its proceedings, and expressly desired that his name might not be inserted in the books of the company, was not a contributory, although he had *paid* a sum of money *under protest*, upon ascertaining that his name would be given to the creditors of the company.[4] But where one who had acted as a member of a provisional committee, had, in ignorance of the fact that his application to have his name withdrawn from the committee had been acceded to, *made a payment* towards liquidating the debts of the company, this was held such a recognition of his liability as would warrant his name being put on the list of contributories.[5] - - - - In a joint action by engineers for work done by them for a railway company, of which the defendant was a provisional committee-man, in order to prove the joint employment of the plaintiffs by the defendant, the plaintiff put in evidence all the resolutions of the provisional committee at meetings at which the defendant was present and in which he took part. The defense was that the plaintiffs, or one

[1] Abbott *v.* Cobb, 17 Vt. 592; *post*, § 5167.

[2] Patrick *v.* Reynolds, 1 C. B. (N. S.) 727.

[3] Newton *v.* Belcher, 12 Q. B. 921; *s. c.* 6 Ry. Cas. 38; 13 Jur. 253; 18 L. J. (Q. B.) 58.

[4] Hall's Case, 3 De G. & Sm. 214.

[5] Besley's Case, 3 Mac. & G. 287 (reversing *s. c.* 2 Mac. & G. 176; and affirming *s. c.* 3 De G. & Sm. 224). Compare Hole's Case, 3 DeG. & Sm. 241.

of them, was to hold the defendant harmless, and that he was to be free from all personal liability. In order to establish this defense, the defendant offered in evidence a resolution to the effect that the engineers were to be employed, that they were to give the usual bond of indemnity to the members of the provisional committee, and that such bond should be immediately ready for execution so as to free them from all responsibility. Neither the plaintiffs nor the defendant were present at the meeting at which this resolution was passed, and the plaintiffs had no notice of it. It was held that it was properly admitted in evidence against the plaintiff's objection; since it would not appear until the conclusion of the case, whether the case was rested upon the actual authority given by the defendant to the other members of the provisional committee, or to persons acting by their authority, or whether the defendant himself had personally employed the plaintiffs. That being so, the defendant had a perfect right to show that, by the terms under which he and the other members of the provisional committee had entered into the undertaking, they were not to incur any personal responsibility, and that such a member was not to have the power of binding the rest.[1]

§ 436. Evidence to Charge the Associates in an Abortive Corporation.— Where the evidence was that all the members of an association which failed to become incorporated, authorized the prosecution of the contemplated work, and knew that it was actually being carried forward under the direction of the appointed agents of the association; that the executive committee was authorized by the association to prosecute the work as its agent, and for that purpose to employ laborers; that the contract which was the subject of the action was made by two members of the committee, professedly in behalf of the association; and that the whole committee, having knowledge of that fact, ratified the agreement, by making payment from time to time in accordance with it,— it was held that there was evidence to charge them all.[2]

§ 437. Liability of Associates for Expenses of Agents Appointed to Procure Charter. — Where certain persons associated for the purpose of instituting a bank, and at a meeting held by them, at which all were not present, appointed an agent to attend the legislature for the purpose of procuring a charter, and the agent attended accordingly and failed to obtain the charter, it was held that all the associates

[1] Rennie v. Clarke, 5 Exch. 292.

[2] Johnson v. Corser, 34 Minn. 355.

were jointly liable to the agent for his services. "If any of them were not present, they tacitly agreed to be bound by the acts and doings of those who attended; especially as they did not afterwards protest or object against those acts. Properly the jury might well infer their assent to an act so necessary to the accomplishment of their views, as the appointment of an agent to solicit from the legislature a charter of incorporation; and from such assent a moral obligation arises to make a reasonable compensation for the time and labors of the agent so appointed."[1]

ARTICLE II. LIABILITY TO SUBSCRIBERS.

§ 440. Liability to Subscribers for their Deposits where the Undertaking Proves Abortive. — A person who has paid his money for shares in a company which never comes into existence, or towards a scheme which is abandoned before it is carried into execution, has paid it on a consideration which has failed, and he may recover it back in an action at law as so much money had and received to his use, unless it can be shown that he has consented to, or acquiesced in the application of the money which the directors or managers of the enterprise have made;[2] and he may maintain a bill in equity for the same purpose.[3] There is sound reason in placing the liability for the ex-

[1] Sproat *v.* Porter, 9 Mass. 300, 303.

[2] Nockels *v.* Crosby, 3 Barn. & Cres. 814; *s. c.* Thomp. Off. Corp., p. 148; Ashpitel *v.* Sercombe, 5 Exch. 147; *s. c.* 6 Ry. Cas. 224; 19 L. J. (Exch.) 82; Ward *v.* Lord Londesborough, 12 C. B. 254; Vollans *v.* Fletcher, 1 Exch. 20; Chaplin *v.* Clark, 4 Exch. 402.

[3] Colt *v.* Woolaston, 2 P. Wms. 153; *s. c.* Thomp. Off. Corp., p. 169; Green *v.* Barrett, 1 Simons, 45; Will-

penses of abortive concerns upon the promoters of them. In all such projects, some expense must necessarily be incurred before many members join the concern. Obviously this expense ought to fall on those who engage and undertake to float the concern, and not upon those who advance their money on the faith of the former being able to float it.[1]

§ **441. Grounds of Recovery at Law in such Cases.**— There are two grounds of such a recovery at law, namely: 1. The failure of the project; and 2. The want of acquiescence in the expenditure of the money paid into it. These are both *questions of fact*, and, in such an action, they must *both* be determined for the plaintiff to enable him to recover. As to the first ground of recovery, that the undertaking has failed, the burden

iams *v.* Page, 24 Beav. 654; Grand Trunk &c. R. Co. *v.* Brodie, 9 Hare, 822; Williams *v.* Salmond, 2 Kay & J. 463 (where the principle was recognized, though the bill was dismissed).

[1] "On all projects," said Holroyd, J., "some expense must be incurred before many members join the concern. Upon whom should that fall? Undoubtedly, if the scheme proves abortive, it should fall upon the original projectors, and not upon those who advance their money on the faith of its going on." Nockels *v.* Crosby, 3 Barn. & Cres. 814, 822. To the same effect were the views of Pollock, C B., in Wallstab *v.* Spottiswoode, 15 Mees. & W. 501, 516. On similar grounds, where the holder of shares (who was not an original allottee of them), sold them to B., and the company was afterwards abandoned, it was held that the vendee could recover of the vendor the money advanced on them. The decision proceeded on the principle that since the shares were not salable until the company was formed, the vendor sold a mere nothing — an alleged title of no value. "If he bought of another," said Best, C. J., "he may sue the seller, and the seller, the party from whom he purchased, till at last we come to the original projectors, and in getting at them a great service will be done." Kempson *v.* Saunders, 4 Bing. 5; *s. c.* 12 Moore, 44. A case is found where the provisional directors of a railway company covenanted with a land owner to pay him £3,000 for all damages which might be done to his land by the construction of a proposed railway (in case an act of Parliament should be passed authorizing it), and he in turn covenanted to convey to the company the land which they might require for their road, at a given price per acre. An act of Parliament was passed, but the road was not built, and consequently the damages for which the £3,000 were to be paid were not done to the land; but yet it was held by Parke and Platt, BB., that the £3,000 must be paid; Pollock, C. B., on the other hand, thought that the building of the road was a condition precedent to the liability for the damages. Bland *v.* Crowley, 6 Exch. 522. Compare Webb *v.* Direct London and Portsmouth R. Co., 9 Hare, 129 (reversed on appeal, 1 DeG. Mac. & G. 521).

of proof is on the plaintiff; as to the second, that the plaintiff has not consented to, or acquiesced in, the application of his money which has been made, the burden is on the defendant; since, in the absence of all proof on this point, such acquiescence will not be presumed. On familiar grounds, these questions are to be determined by the jury, unless the evidence arises wholly out of documents, when they are to be determined by the court. If a case arises in which there is evidence on the first ground of recovery, namely, that the undertaking has proved abortive, and no evidence, either for the court or for the jury, that the defendant has acquiesced in the use of his money which has been made, then it is not a misdirection for the judge to leave out of view the second ground of recovery, namely, want of acquiescence, and to tell the jury that if the project has been abandoned as abortive, the plaintiff is entitled to a return of his deposit.[1] The principle of these cases is that the expenses of an abortive company are to fall upon the promoters, and not upon persons who subscribe for shares therein. There is no obstacle to the recovery of moneys so paid by a subscriber in an action at law; for, although an action at law will not lie by one partner against another in respect of a partnership demand, as already pointed out,[2] yet even in England, where joint-stock companies, when fully formed, were deemed no more than extensive partnerships, it has been held that one who subscribes for shares in a proposed company, does not, so long as it remains a mere project, become a partner, or even a *quasi*-partner with the promoters of it.[3] And this is in conformity with the rule elsewhere stated, that a partnership is not created by a mere agreement to organize a partnership;[4] and the same principle has been substantially ruled in Massachusetts, where it is held that the stockholders of an abortive corporation are not partners, and not liable as such for the debts of the company.[5]

§ **442. Illustration.**—Where a scheme for establishing a *tontine* was put forth, stating that the money subscribed was to be laid out at

[1] Ashpitel *v.* Sercombe, 5 Exch. 147; *s. c.* 6 Ry. Cas. 224; 19 L. J. (Exch.) 82.

[2] *Ante*, § 429.

[3] Walstab *v.* Spottiswood, 15 Mees. & W. 501; *s. c.* 15 L. J. (Exch.) 193.

[4] *Ante*, § 421.

[5] Fay *v.* Noble, 7 Cush. 188.

interest, and, after some subscriptions had been paid to the directors, in whom the management of the concern was vested, but before any part of the money was laid out at interest, the directors resolved to abandon the project, it was held that each subscriber might, in an action for money had and received, recover the whole amount of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred.[1]

§ 443. Grounds of Recovery in Equity.— The jurisdiction of courts of equity in such cases is sustainable on the two grounds of *fraud* and *trust*. Where the undertaking is a *swindle* in its inception — a *bubble* — courts of equity will sustain a bill by a shareholder to recover back moneys which he has paid as deposits on his shares, on the ground of fraud.[2] But where this is not the case — where the undertaking is *bona fide* in its inception, but is abandoned on account of the intervention of obstacles which render it impracticable to carry it out, the principle holds that the managing committee are not the mere agents of the shareholders, but their trustees, and liable to account as such.[3]

§ 444. Remedy in Equity Lost by Laches. — In the view of Sir John Romilly, the nature of this trust is such that while time

[1] Nockels *v.* Crosby, 3 Barn. & C. 814; *s. c.* Thomp. Off. Corp. 148.

[2] Colt *v.* Woollaston, 2 P. Wms. 154; *s. c.* Thomp. Off. Corp. 169; Green *v.* Barrett, 1 Simons, 45. Since the leading case of Colt *v.* Woollaston (*supra*), it has not been doubted that the promoters of abortive companies are liable in equity to persons who have been induced by their fraudulent representations or advice to invest their money therein, although the equitable action proceeds for no other relief except the establishment of a mere money demand. In that case the simple proposition which the court ruled was that a bill in equity lies to recover back money which a person has been induced, through fraud, to invest in a "bubble." The bubble in question consisted of a scheme for *extracting oil from English radishes;* and the Master of the Rolls quaintly said, touching the promises made to the subscribers and the performances rendered, — "It is giving them *moonshine* instead of anything real."

[3] Williams *v.* Page, 24 Beav. 654, 661. "The trust," said Sir John Romilly, in giving his judgment in this case, "no doubt is a peculiar one; such as it is, they have undertaken to discharge the duties of it, and they must be responsible for the due performance of them. In my opinion, all principle and authority point one way upon this subject, and I should consider myself wasting public time by enunciating and enforcing elementary principles which are familiar to every one cognizant of legal matters, if I were to enlarge upon this subject."

is not a bar to a suit in equity for an account by the mere force of the statute of limitations, yet it is a very material ingredient in such a transaction, which courts of equity will not fail to consider, in view of the discretion which they have always exercised, of refusing their aid in the enforcement of stale demands. If the managing committee of an abortive company have three or four years before the filing of the bill, rendered their accounts, and divided the money in their hands, without meeting any comment or remonstrance on the part of shareholders, they might well suppose that they had got rid of the whole matter, and might have lost or failed to preserve vouchers and evidence on the subject of their account. In such cases, all that is most favorable, ought to be presumed in their favor. But, on the other hand, if, in the account rendered by them, there was any concealment of a material item, or if they suppressed any important circumstance affecting that account, it would be difficult to say that three or four, or even more years, of acquiescence in an account so rendered would bind the shareholders.[1] Accordingly, where, although there was no direct concealment by the managing committee of an abortive railway company, yet there was no publicity; where their books of account, though open to the inspection of shareholders, were not so, in all cases, without difficulty; and where there had been an intervening suit against them for an account which had not been disposed of until two and a half years before the bringing of the suit in judgment, — it was held that it did not constitute any bar to the suit in equity by a shareholder for an account, however justly it might do so in a case where their accounts had been rendered, inspected, not objected to, and no error or defect subsequently assigned in respect of them.[2]

§ 445. Equity Repels Actions Brought for Barratrous Purposes. — It has been held that a court of equity will not lend its aid to the undoing of such a scheme of fraud, or to compel the managers of an abortive company to account, in favor of a solicitor who has instituted the suit for *barratrous purposes*, if

[1] Williams *v.* Page, 24 Beav. 654, 662. The text is substantially in the language of Sir John Romilly in this case.

[2] *Ibid.*

it appears that the nominal plaintiff has been indemnified by the solicitor and has no real interest in its prosecution.[1] If, however, it appears that the plaintiff has an interest in the success of the suit, although small, he will not be turned out of court merely because it is being prosecuted under a barratrous contract with his solicitor.[2]

§ 446. In Returning Deposits, Breach of Trust to Prefer Particular Shareholders.— If it appears that the managing committee of an abortive company, in restoring to the shareholders what remains of their advances, after applying what is necessary to the payment of those expenses which, according to the scheme, were to be so paid, *prefer* certain of the shareholders by treating their advances as *loans* and paying them in full, while the others get back only a percentage of their deposits, the transaction will be undone by a court of equity, in a bill by a shareholder for an account.[3] Moreover, if it appear that such deposits were paid by shareholders who advanced them in order to comply with the standing orders of the House of Lords, which required a certain amount to be paid in by shareholders, before a bill for an act of incorporation would be entertained, this would make the transaction still worse; for to treat such payments as a loan by such persons, to the managers, under color of a subscription to the stock of the proposed company, would be to sanction a fraud upon the House of Lords.[4] The governing principle of these cases is this: whoever makes a colorable subscription for shares in a company, simply for the purpose of deceiving others, with the understanding between himself and the managers that he is not to be held to the liabilities of a subscriber, will, nevertheless, be held, both in law and in equity, to the very form of the contract he has made.[5]

[1] Grand Trunk &c. R. Co. *v.* Brodie, 9 Hare, 822.

[2] Williams *v.* Page, 24 Beav. 654, 665. As to the *necessary parties* to such a bill, see this case and also Williams *v.* Salmond, 2 Kay & J. 463; Grand Trunk &c. R. Co. *v.* Brodie, 9 Hare, 822; Clement *v.* Bowes, 1 Drew. 684.

[3] Williams *v.* Page, 24 Beav. 654, 663.

[4] *Ibid.*; Clement *v.* Bowes, 1 Drew. 684, 688.

[5] Litchfield Bank *v.* Church, 29 Conn. 137, 150; Centre Turnp. Co. *v.* McConaby, 16 Serg. & R. 140; Graff *v.* Pittsburgh &c. R. Co., 31 Pa. St. 489; White Mountains R. Co. *v.* East-

And if the managers of the company give effect to the fraudulent agreement, by restoring moneys which the subscriber has advanced in pursuance of it, they will be subject to account for the same in equity to those whose rights have been prejudiced by the transaction.[1]

§ **447. Release by Contract of Right to Recover Deposits.**— Applicants for shares in English railway companies, disabled themselves, in the absence of fraud,[2] for recovering back their deposits at law by signing what was termed the "subscribers agreement and parliamentary contract," which, it is supposed, contained provisions to the effect that the moneys advanced might be expended in defraying the costs of the undertaking; and where a subscriber agreed to sign the "subscribers agreement and parliamentary contract," and the scrip certificate which he received recited that he had done it, this cut off his right to sue for a deposit, the same as an actual signing.[3] So, where the letters allotting shares to subscribers in projected railway companies stated that the deposits required to be paid, would be applied by the directors in the payment of preliminary expenses, the fact that such moneys were so paid would be a defense to actions by subscribers to recover them back.[4] Some questions have been made as to the manner of proving the contract in such cases. It has been held that it was not necessary for the plaintiff to show that he had sent a letter of application for the shares, because a letter of allotment to him and his payment of the deposit after the receipt of such letter, constituted a contract.[5]

man, 34 N. H. 134; Custar *v.* Titusville Gas Co., 63 Pa. St. 381, 386. See also Miller *v.* Hanover Junction R. Co., 87 Pa. St. 95; *post,* § 1578.

[1] That arrangements releasing particular shareholders other than *bona fide* forfeitures for non-payment of calls, are void, see Hall's Case, L. R. 5 Ch. 707; *s. c.* 39 L. J. (Ch.) 730; 18 Week. Rep. 1050; 23 L. T. (N. S.) 331; *post,* § 1511 *et seq.*

[2] Atkinson *v.* Pocock, 1 Exch. 798. The fact that at the time when the subscriber executed the deed, deposits had been paid upon only 18,160 shares, although 35,000 shares had been allotted, and this fact was not communicated to him, did not constitute such a fraud as would avoid his contract and entitle him to recover back his deposits. Vane *v.* Cobbold, 1 Exch. 798.

[3] Clements *v.* Todd, 1 Exch. 268.

[4] Jones *v.* Harrison. 2 Exch. 52; Willey *v.* Parratt, 3 Exch. 209.

[5] Chaplin *v.* Clarke, 4 Exch. 402. As to acts *in pais* which were held insufficient to prove that the defendant was a director, see Drouet *v.* Taylor, 16 C. B. 670.

§ 448. Construction of such a Contract — Agreement to Execute Future Agreement. — When a person applies in writing for shares in a projected undertaking, and in his application agrees to execute any agreement, or deeds which may be tendered to him for that purpose, and a proper and lawful agreement such as was contemplated in his letter is tendered him for execution, and he fails or refuses to execute it, he will, it seems, be bound by its provisions the same as though he had executed it; and if it appears that the money he has paid on account of his subscription has been expended as therein authorized, he will in the event the project becomes abortive, be estopped from maintaining an action to recover back what he has paid. But if the agreement tendered to him for execution contain provisions not authorized by law, it will not have this effect.[1]

§ 449. What Committee-men are Liable. — From the doctrine that promoters and provisional committeemen are not partners,[2] it follows that where such a committee have issued a prospectus for subscriptions to the capital stock of the proposed company, and subscriptions have been sent in, and the company has afterwards proved abortive, the subscribers can only recover the deposits which they have made on account of their subscriptions, from those committee-men who received them, or to whose use they were received. The fact that the name of the committee-man, with his consent, appeared upon a prospectus soliciting subscriptions to the stock of the proposed company, does not make him so liable. In short, it must be shown that he got the money. In the absence of such proof, a member of such a committee whose name had been so published, who had attended but one meeting of the committee, at which he had presided as chairman, but at which he dissented from the proceedings, was not liable in an action by a subscriber for the repayment of his deposit money.[3]

[1] Ashpitel *v.* Sercomb, 5 Exch. 14; *s. c.* 6 Ry. Cas. 224; 19 L. J. (Exch.) 82.

[2] *Ante*, § 421.

[3] Burnside *v.* Dayrell, 3 Exch. 224; *s. c.* 6 Ry. Cas. 67; 19 L. J. (Exch.) 46. Without venturing a criticism upon the English rule which holds promoters and provisional committeemen not liable as partners — a rule which has been productive of frequent injustice — we may venture to question the soundness of the above application of it. It undertakes to distin-

§ 450. Action at Law against Promoters for Deceit. — Persons who have been induced, either by the fraudulent representations or concealments of promoters, to subscribe for shares in a company and pay deposits thereon, have another remedy against them in an action at law for damages for the deceit. This action differs from those considered in the previous sections. It is not an action *ex contractu*, proceeding on the fiction of an *implied assumpsit*, for so much money had and received by the defendant to the use of the plaintiff, but it is an action of *tort*, the object of which is to recover the *damages* which the plaintiff has sustained by reason of the deceit which the defendant has practiced upon him. Unless the company prove abortive, an action *ex contractu* would not lie against promoters as such: for, at least under the present plan of organizing companies in England, shares are not issued until the organization of the company has been so far perfected that a board of directors has been constituted; it is with this board of directors that contracts to take shares in the company are made, and not with the promoters. If the fraudulent prospectus which induced the subscriber to take shares in the company was issued by the promoters, although this might afford a ground for maintaining an action against the company for a rescission of the contract, yet an action for damages for a deceit can only be maintained against the persons who have actually been guilty of it, namely, the promoters. Privity of contract would not be necessary to support such an action. This distinction is well brought out in a leading case,[1] and as we shall recur to it again in considering the liability of directors for similar frauds,[2] it will not be necessary to dwell on it further here.

§ 451. Measure of Damages in Such Actions. — If, in such an action, it would appear that the shares subscribed for never had any real value, the measure of damages would be the money

guish Walstab *v.* Spottiswoode, 15 Mees. & W. 501, but in the writer's opinion it cannot be reconciled with that case or with the earlier case of Nockels *v.* Crosby, 3 Barn. & Cres. 814; *s. c.* Thomp. Off. Corp. 148, which hold, broadly, that promoters of abortive companies are liable in actions for money had and received to persons who have subscribed for shares in them, for the money advanced on their shares.

[1] Gerhard *v.* Bates, 2 El. & Bl. 476; *s. c.* 20 Eng. L. & Eq. 129; Thomp. Off. Corp. 158.

[2] *Post*, § 4030, *et seq.*

which the fraud of the defendant had induced the plaintiff to part with — that is, the money which he had paid on account of his shares.[1] But there seems to be no doubt that if the shares were really worth anything when bought, the defendants ought to have credit for what they were really worth. But this must be understood as referring to their real value, and not to the fictitious and delusive value which they might have acquired by reason of the very fraudulent representations which induced the plaintiff to purchase them; since the plaintiff, knowing the falsity of these representations, could not sell the shares in order to save himself from loss, without being himself guilty of a fraud of the same nature as the one practiced upon him. It is obvious that such a value, based upon such a foundation, could not be looked to for a moment by a court of justice. For this reason, the fact that shares put upon the market by means of false representations, such as would be sufficient to sustain an action for deceit against the promoters, were quoted at a premium on the stock exchange, would not be conclusive of their value, since it would not show a real, but only fictitious and delusive value.[2]

§ 452. **Remedy in Equity of Sharetaker against Promoters for Fraud.** — Where the promoter of a company, together with the directors, puts forth a fraudulent prospectus, on the faith of which a person is induced to purchase shares of the company, he may bring a bill in equity against the company, the directors, and the promoter, and under it he will be entitled to a rescission of his contract. If, in the meantime, the company is ordered to be wound up, he will be entitled to have his name removed from the list of contributories, and to have an account of the moneys he has paid to the company, and of the sums he has received as dividends, with interest on both sides, and to have a decree against all the defendants for payment to him of the balance so found due him, and also an injunction against any further action against him for calls.[3] Where a bill in equity is brought under

[1] Twycross *v.* Grant, 2 C. P. Div. 469.

[2] Twycross *v.* Grant, 2 C. P. Div. 469, 489, judgment of Lord Coleridge, C. J. See also the views of Lord Cockburn, on the same question, *Ibid.*, pp. 542–546.

[3] Kent *v.* Freehold Land &c. Co., L. R. 4 Eq. 588. In Henderson *v.* Lacon, L. R. 5 Eq. 249, similar relief was

the English judicature act, 1875, in the nature of an action for deceit, by a shareholder in a company against the promoter of it, seeking to recover of such promoter the amount which the plaintiff has lost by investing in the shares of the company, which investment is alleged to have been induced by the fraud and deceit of the promoter, the plaintiff, in order to succeed, it has been held, must make out his action by proof similar to that which, under the old practice, was required in an action for deceit. He must prove a guilty *scienter* on the part of the promoter. On this ground, where a person purchased a colliery for £16,000 odd, and then promoted a company to purchase it of him, and sold it to the company for £23,000 odd, in which company he became a managing director, the fact that he concealed from those whom he induced to take shares in the company (among whom was the plaintiff) the amount which he actually gave for the property, was held by Vice Chancellor Bacon not to be such a fraud and deceit as would support a bill in equity by the shareholder against him, for the recovery back of the money which he had been thus induced to part with. In fact, the learned judge could not see that the transaction was not perfectly fair and honest.[1] This, it seems to the writer, was a perfectly clear case of a promoter of a company speculating on the confidence of those whom he induced to join in the proposed venture. Unless the writer is greatly deceived, the conduct of the defendant was entirely obnoxious to the doctrine of the House of Lords in the subsequent case of Erlanger *v.* New Sombrero Phosphate Co.,[2] and the conclusion of the judge who tried the case does not do credit to his perception of justice. We must, in any event, regard this case as overruled by the Court of Appeal in Twycross *v.* Grant.[3]

§ **453. Measure of Recovery in Equity.**— A promoter participating in the fraud of his personal representative is liable to

granted against directors of a company under similar circumstances, though the promoters were not parties to the suit. Compare Foss *v.* Harbottle, 2 Hare, 461, where a bill of two shareholders, filed on behalf of themselves and all other shareholders, was dimissed, on the ground that it showed no obstacle to the bringing of a bill by the company for the relief prayed for.

[1] Craig *v.* Phillips, 3 Ch. Div. 722.

[2] 3 App. Cas. 1218 (affirming *s. c.* 5 Ch. Div. 73); 4 Cent. L. J. 510; *infra*, § 459.

[3] 2 C. P. Div. 469. See § 456.

the *bona fide* subscribers, not only for their due proportion of the profits he himself has realized, but also for their due proportion of the fund which he has received as trustee and misappropriated by paying it over to those privately interested with him.[1]

Article III. Liability to the Company.

§ 456. Promoters Bound to Disclose what They are to get for their Services.— Where persons undertake the promotion of a company for the purpose of purchasing certain existing property, under an agreement with the owner and proposed vendor of such property, by which they are to receive a certain compensation for promoting the company, they are bound to disclose to those whom they induce to become members of the company, what their compensation is to be. The concealment of such an agreement is a fraud on the company. It amounts to an agreement, by the vendor, with an agent of an intended purchaser, to give him a bribe to betray the interests of his principal.[2] If the

[1] Getty *v.* Devlin, 70 N. Y. 504; *s. c.* on former appeal, 54 N. Y. 403. *Contra,* Bent *v.* Priest, 10 Mo. App. 543, Lewis, P. J., dissenting.

[2] Re Hereford &c. Co., 2 Ch. Div. 621.

promoters of a company conceal such an agreement from those whom they induce to join it, and the company proves abortive, they will not be allowed, in the winding up of the company, compensation for their service, either before or after the formation of the company. The reason is that labor performed by them in inducing persons to become members of a company by fraudulently concealing from them a certain material fact, is in the eye of a court of equity, deemed to have been of *no value* to the company."[1]

§ 457. Cannot Make Secret Profits out of the Corporation.— Promoters of a corporation occupy a fiduciary relation to it and have no right to derive any advantage over other stockholders, without a full and fair disclosure of the transaction; and any secret profits which they acquire through promoting the corporation must be refunded, and may be recovered in equity by the corporation or its legal representative, and in many cases at law.[2] Persons who organize a corporation for the purpose of working certain property are bound to disclose to persons, who may be by them induced to join them in the company, what the vendors of the property actually received for it; and if, by deceiving the members of the company as to the actual price paid for the property, or if, by collusion with the vendors they are permitted to retain for themselves a portion of the purchase money, they must account to the company for the same *in equity;*[4] or the company

[1] *Ibid.*

[2] Chandler *v.* Bacon, 30 Fed. Rep. 538. The following cases support the principle that such profits are recoverable, though some of them were actions at law: Bagnall *v.* Carlton, 6 Ch. Div. 371; Whaley &c. Co. *v.* Green, 5 Q. B. Div. 109; Charlton *v.* Hay, 31 L. T. (N. S.) 437; *s. c.* 23 W. R. 129; New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. Div. 73; Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; McElhenny's Appeal, 61 Pa. St. 188; Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; *s. c.* Thomp. Off. Corp. 172; Emery *v.* Parrott, 107 Mass 95; Getty *v.* Devlin, 54 N. Y. 403; *s. c.* 70 N. Y. 504; Hichens *v.* Congreve, 1 Russ. & M. 150; Fawcett *v.* Whitehouse, 1 Russ. & M. 132; Beck *v.* Kantorowicz, 3 Kay & J. 230; St. Louis &c. Mining Co. *v.* Jackson, 5 Cent. L. J. 317. The *principle* is found embodied in cases without number: Tyrrell *v.* Bank, 10 H. L. Cas. 26; Kimber *v.* Barber, L. R. 8 Ch. 56; Puzey *v.* Senier, 9 Wis. 370; Pickett *v.* School District, 25 Wis. 551; Cook *v.* Mill Co., 43 Wis. 433; Re Orphan Asylum, 36 Wis. 534. It is more fully considered hereafter in its relation to *directors. Post,* § 4029 *et seq.*

[3] Bank of London *v.* Tyrrell, 5 Jur.

may maintain an action of *assumpsit* against them for the moneys so secretly reserved to themselves, as so much money had and received to its use.[1] In like manner, persons who purchase property and then organize a company to purchase it from them, stand in a fiduciary position towards such company, and must faithfully state to the company all material facts relating to the property, which would influence the company in deciding on the desirability of purchasing it.[2] In such cases the owners of property who desire to create a company for the purpose of purchasing it from them are bound, if they wish to make a contract which will stand, to nominate independent directors, and to disclose to them the actual facts.[3] The principle upon which courts of equity proceed in these cases is a very familiar one. The promoter of a company, like its directors, is deemed to sustain towards the members of the company the relation of a trustee towards his *cestui que trust*. This being so, he will not be permitted to speculate out of that relation, or to derive secret advantages from it. He is bound to disclose to them fully all material facts touching his relation to them, including the amount which he is to get for his services as promoter, usually called "promotion money." But, plain as this principle is, great difficulty sometimes arises in applying it, for it is not always easy to determine at what time this trust relation springs into existence. If the contract is made with the company, or with persons acting for it, before he assumes towards it the relation of promoter, then he is not bound to disclose what he gave for the property; the case stands precisely like a case of bargain and sale between two strangers; and if, without fraud, he gets a good bargain from the company, it is so much good fortune for him.[4]

(N. S.) 924; Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918; Atwool *v.* Merryweather, L. R. 5 Eq. 464, note; Lydney &c. Co. *v.* Bird, 33 Ch. Div. 85; *s. c.* 24 Am. & Eng. Corp. Cas. 23. Compare Cumberland Coal &c. Co. *v.* Sherman, 30 Barb. (N. Y.) 553.

[1] Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; *s. c.* Thomp. Off. Corp., p. 172; Whaley &c. Co. *v.* Green, 5 Q. B. Div. 109.

[2] Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218 (affirming *s. c.* 5 Ch. Div. 103); 4 Cent. L. J. 510.

[3] *Ibid.*, 3 App. Cas. 1229, per Lord Penzance.

[4] Gover's Case, 1 Ch. Div. 182. See also Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218 (affirming *s. c.* 5 Ch. Div. 103); 4 Cent. L. J. 510, and reversing the decision of Vice Chancellor Malins, 5 Ch. Div.

§ 458. Purchasing and then Selling to Corporation at a Higher Price. — It has been well said: "A trustee or agent cannot purchase on his own account what he sells on account of another, nor purchase on account of another what he sells on his own account; . . . and if he does so, the *cestui qui trust* or principal, unless, upon the fullest knowledge of all the facts, he elects to affirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit.[1] This principle is undoubtedly applicable to promoters of a corporation not yet *in esse*,[2] though it may be difficult in strict logic to work out such a case upon the theory that they are trustees for a body which is not *in esse* and which they are proposing to create. Perhaps the conclusion is better worked out upon the reasoning of a recent writer of reputation: "Before any shares had issued, the existence of the company was a fiction. The shareholders really formed the company, each one becoming a member when he took his shares. While the contract for the purchase of the property was nominally in force from the time of its approval by the board of directors, yet it really took effect only after the shareholders had taken their shares. It then became binding on all the shareholders collectively, or, in other words, on the company. The fraud really consisted in inducing the shareholders to enter into this contract in their collective capacity, and in using the funds belonging to the shareholders collectively in paying the purchase price. It is evident therefore that the injury to the shareholders was not an injury to the collective or corporate interests, and that the company was the proper complainant."[3] It seems, however, that the case cannot rest upon the idea of two parties to a trade dealing with each other at

91, which proceeded on the authority of Gover's Case.

[1] Parker *v.* Nickerson, 137 Mass. 487; Parker *v.* Nickerson, 112 Mass. 195. Cases affirming this principle: Tyrrell *v.* Bank, 10 H. L. Cas. 26; Kimber *v.* Barber, L. R. 8 Ch. 56; Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; Puzey *v.* Senier, 9 Wis. 370; Pickett *v.* School District, 25 Wis. 551; Cook *v.* Berlin &c. Co., 43 Wis. 433; Re Orphan Asylum, 36 Wis. 534.

[2] Society *v.* Abbott, 2 Beav. 559; New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. Div. 73; St. Louis &c. R. Co. *v.* Tiernan, 37 Kan. 606; Re Paper Box Co., 17 Ch. Div. 471.

[3] Mor. Priv. Corp., 1st ed. § 279; commenting on New Sombrero Phosphate Co. *v.* Erlanger, 5 Ch. Div. 73.

arm's length. While the promoters, at the time of making the offer, are not in a relation of trust and confidence with those to whom they make it, yet by the offer itself they propose to enter into such a relation with them; and this circumstance puts them under the same duty of making full and fair disclosures to them which they would be under if the trust relation had already been established. There is a depth of turpitude in the concealment of material facts under such cases, analogous to that which exists where material facts are concealed by persons intending to enter into the marriage relation with each other. The very suggestion made by associates to intending subscribers to the corporate shares — "We are going to be your co-adventurers in this enterprise to be founded and prosecuted for the common profit of all," —implies an obligation on their part to deal openly and with the same fidelity which is demanded where a trust relation has been established. If, under such circumstances, they purchase property at one price and sell it to the corporation at a greater price, concealing from its members the fact that they are making a profit, according to all ordinary conceptions of honesty, each member has the right to say that he has been cheated.[1]

[1] Sir Nathaniel Lindley, in his work on partnership, after stating the rule that neither partners nor directors of a company are at liberty to make individual profits out of the business of the concern without the knowledge and consent of their associates, says: "The rule under consideration is peculiarly applicable to transactions which precede the formation of a company or partnership. Judging from recent events and disclosures, nothing seems more common than for a person engaged in getting up a company, to obtain for the company property of which it is in want, and try and make the company pay him more than he gave for it. Such a transaction can never stand. There may undoubtedly be a valid sale to a company by persons engaged in getting it up; . . . but once let it be shown that the alleged vendor obtained the property when it was his duty to obtain it for the company, and it immediately follows that he can not, without the fullest disclosure on his part, charge the company with more than he actually gave." Lind. Part. (1st ed.) 497. To the same effect is the opinion by Sir John Romilly, M. R., in Bank of London *v.* Tyrrell, 5 Jur. (N. S.) 924, distinguishing Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586. Quoting this language, it has been said in the Supreme Court of Pennsylvania by Mr. Chief Justice Thompson: "The principle is undoubtedly the same where parties profess to have acted for a company and their purchases have been accepted on representations that they were made for it. In one or the other of these attitudes, namely, as agents of a company to be gotten up, or as having professed so to have acted, the jury must have found they

It is immaterial that the company gets the property at a *good bargain.* This does not relieve the promoter from liability; for the company has a right to the best bargain which those acting in its interest as fiduciaries can, with full knowledge of the facts, give it.[1] Nor is it an answer to such an action that the company is a fluctuating body, and that it may be that no person who was a member at the time of the transactions is a member at the time of the bringing of the suit; but in such a case the court is bound to consider the company as having a perpetual existence, and is not at liberty to go into the question of what individuals it is composed of.[2]

§ **459. Illustrations.** — A leading case on this subject is, without doubt, that of Erlanger *v.* New Sombrero Phosphate Co.,[3] which went through the various courts of equity in England to the House of Lords, by which House it was decided in the year 1878. The facts of it were as follows: A "syndicate" (or partnership) of persons, of which one Erlanger was at the head, purchased from the official liquidator of an insolvent company, an island said to contain valuable mines of phosphates. Erlanger, who managed the business of this purchase, prepared to get up a company to purchase the island and work the mines. He named five persons as directors. Two were abroad. Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appears to have acted as a business agent of Erlanger; the other was his friend. The sale of the island was made, nominally, by a person who really had no interest in the island, and was made to the director who was the business agent of Erlanger, and who appeared as the purchaser of the company. The two directors, with whom, through Erlanger's arrangement, a third person, D. (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted, on its behalf, the purchase. A prospectus was issued giving a very favorable account of the scheme. Many persons took shares. At the first meeting of the

stood. In either, it seems clear, they could not legally retain the advance price on the property which they received." Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202, 218; *s. c.* Thomp. Off. Corp. 172, 192.

[1] Beck *v.* Kantorowicz, 3 Kay & J. 230.

[2] Phosphate Sewage Co. *v.* Hartmont, 5 Ch. Div. 394, 441.

[3] 3 App. Cas. 1218 (affirming *s. c.* 5 Ch. Div. 103); 4 Cent. L. J. 510.

shareholders, D. took the chair as a director. Being questioned by a shareholder as to certain rumors relating to the purchase of the island and its price, on the first sale, and then on its resale to the company, D. avowed his want of knowledge, but declared his belief, in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February 1872. In June of the same year there was a general meeting of the shareholders. The rumors before referred to had become stronger, and a committee of investigation was appointed, on the receipt of whose report in the following August, the original directors were, at a public meeting, removed, and a new set of directors appointed, with power to take measures, etc., for the good of the company. The new directors entered into a correspondence with the vendors of the island, which terminated in nothing; and in December, 1872, a bill was filed to rescind the contract. It was held that the contract could not be sustained. Upon these facts the only substantial disagreement between the equity judges and the law lords, appears to have been on two points: 1. Whether the syndicate represented by Baron Erlanger were really promoters of the company at the time of the transaction sought to be undone, in the sense that a fiduciary relation existed between them and the company. It was upon this point that Vice Chancellor Malins, who first heard the case, dismissed the bill. 2. Whether the company had been guilty of laches in not sooner instituting proceedings for a rescission. Upon this ground Lord Cairns, in the House of Lords, thought that the bill could not be sustained. With these exceptions, the judges and law lords seem to have been agreed that it was a case for equitable relief, and it was so finally decided. - - - - By an agreement between the vendors of a mine and G., a financial agent, the vendors agreed to sell the mine to a company to be formed by G. for its purchase at a price named, and that G. should receive 20 per cent. of the amount of the allotted capital of the company. By a second agreement between P., the agent of the vendors, and D. (a nominee of G.), described as agent of the intended company, P. agreed to sell the mine to the company for the price mentioned in the former agreement, but no reference was made to the percentage which G. was to receive. Shortly afterwards the company was formed; the memorandum of association and prospectus which were settled by G., stated that its object was to carry out the second agreement and for the purchase and working of the mine, but they contained no reference to the first agreement, under which G. received the amount therein agreed upon. G. secured the services of the first directors, provided their qualifications, and launched the company. In an action by the com-

pany to make him liable for what he had received without the knowledge of the company, it was held that G. was liable for the amount of the secret profit which he had made; also that, in estimating the amount of such profit he was entitled to be allowed all sums *bona fide* expended in securing the services of the directors and providing their qualification, and in payments to the brokers, to the officers of the company and to the public press in relation to the company.[1] - - - - In another case the facts were that the defendant applied to one W. to assist him in disposing of certain lead mines which he held under an agreement for a lease for twenty-one years, and which he had discovered to be of no value. The defendant proposed to dispose of his interest for £4,000, and the scheme concocted between himself and W. was, that a company should be formed for the purpose of purchasing and working the mines, which were to be sold to such company for £7,000. Of this money the defendant was to receive £4,000, while the remaining £3,000 was to be paid to W. for his assistance in getting up the company. This agreement was concealed from the other directors, who were induced to believe that £7,000 was *bona fide* to be paid as purchase money. Shares in the proposed company were sold, on which £3,940 was received. This money was paid over to the defendant and 600 shares were registered in his name as paid up, in part payment of the £7,000, the alleged price of the mines. The plaintiff filed a bill, on behalf of himself and all the other shareholders of the company, for the purpose of compelling repayment from the defendant and W. of the £3,940, and a return of the 600 shares allotted to the defendant. Sir W. Page Wood, V. C., held that this "was a simple fraud, and nothing else;" that W. was in duty bound to inform the company at what price he had bought the mines; and he accordingly granted the prayer of the bill.[2] - - - - B. & C., as promoters of a projected corporation, negotiated an agreement between the owners of certain patents and the corporation (to be thereafter created) by which B. & C. were to receive 3,750 shares of the capital stock of the new company, less 625 shares which they were to assign to another. B. & C. offered the public an option to take stock in the new company, disclosing the purchase of the patents and also the fact that a portion of the stock was to be issued to the former owners in part payment, but not informing purchasers that they were to have stock on any different terms or conditions. It was further agreed between B. & C. and the owners of the patents that B. should be the president and C. the treasurer of the corporation. They were so elected, and placed a large amount of the stock at seven dollars a share, obtain-

[1] Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918.

[2] Atwool *v.* Merryweather, L. R. 5 Eq. 464, note.

ing their own for nothing. It was held, in a suit in equity by a receiver of the corporation, that they must refund the secret profits so obtained. It was further held that the corporation, or its legal representative, had the right to elect (1) whether the shares should be transferred back to it; or (2) if the shares had been sold, whether the entire profits accruing from the sale should be turned over; or (3) whether it should be paid the sum lost by reason of being deprived of the right to place the shares with other persons at seven dollars per share.[1] The company, or its legal representative, had the right to say: "Although you may have derived no profit by selling the shares, yet you deprived us of placing them with other persons, and you must therefore pay us the sum we have lost by reason of our being deprived of the right of placing these shares with other persons."[2]

§ 460. No Liability where the Transaction is Fully Disclosed. — It is only where the profit is *secret* and *undisclosed* from the other parties in interest, that an action lies to recover it. There is no rule of law or equity which prevents the owner of property from organizing a corporation and selling his property to that corporation at a higher price than he paid for it, provided he discloses the facts. He is bound to put the directors of the purchasing company in possession of full informa-

[1] Chandler *v.* Bacon, 30 Fed. Rep. 538.

[2] *Ibid.*; citing Carling's Case, 1 Ch. Div. 115, 126, 127; McKay's Case, 2 Ch. Div. 1; De Ruvigne's Case, 5 Ch. Div. 306; Nant-y-Glo &c. Co., *v.* Grave, 12 Ch. Div. 738. The concealment of a sub-agreement between the promoters of a company and four of its directors by which a part of a sum which, according to the articles of association, is to be paid to the promoters for their labor and expense in getting up the concern, is in fact paid to such directors, vitiates the whole contract between the company and promoters. Ex parte Williams, L. R. 2 Eq. 214. But where H., a contractor, obtained from one of the cantons of Switzerland a concession for building a railroad, which concession he transferred to a company formed for that purpose, it was held no ground for relieving a shareholder in such company from his contract of subscription that H. had secretly agreed to give to certain directors paid-up shares in consideration of his consenting to act as a director; nor that he had secretly given to two other persons, who afterwards became directors, a sum of money in bills, in consideration of their procuring a credit company to bring out the railway company in question. The reason assigned by Lord Romilly, M. R., for so holding was that these transactions were not such as materially to effect the success of the undertaking, and hence the fact that they had been concealed from the shareholders would not entitle him to say that if he had known of them, he would not have taken the shares. Heymann *v.* European &c. R. Co., L. R. 7 Eq. 154.

tion, so that they can exercise an independent judgment touching all matters which affect the interests of the company.[1] The mere fact that he sells to the company and *afterwards* becomes a director in it, does not make him liable for the profits which he acquired, if he acts openly and honestly and as an independent vendor.[2]

§ 461. Company may Affirm Promoters' Contract and Enforce it for its own Benefit. — It is not at all necessary to the right of the company, as against its promoters, to recover whatever secret profits they have made in violation of their trust, that there should be a rescission of the contract between them and the strangers from whom they may have purchased the property which they have conveyed to the company at an enhanced price.[3] On the contrary, it is within the pleasure of the company to elect to disaffirm and recover specifically what it has parted with, where such a recovery can be had, or to affirm and compel its promoters to account for their profits; [4] and if part of the "promotion money," as it is termed in the English books, remains unpaid, the company may recover in an *action at law* against the vendors, as money belonging to the company, and not to its promoters.[5]

§ 462. Not Necessary to Rescind the Whole Transaction.— It is not necessary for the company, when it comes into existence, to rescind the whole transaction. It may affirm the transaction in so far as it is honest, and disaffirm it in so far as it is fraudulent and against its rights.[6]

[1] Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218.

[2] Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Lungren *v.* Pennell, 10 Weekl. Note of Cas. 297; Albion Steel & Wire Co. *v.* Martin, 1 Ch. Div. 580.

[3] Emma Silver Mining Co. *v.* Lewis, 4 C. P. Div. 396, 409. Compare Ladywell Mining Co. *v.* Brookes, 35 Ch. Div. 400; *s. c.* 17 Am. & Eng. Corp. Cas. 22.

[4] Chandler *v.* Bacon, 30 Fed. Rep. 538.

[5] Whaley &c. Co. *v.* Green, 5 Q. B. Div. 109; *post*, § 467, where the facts are more fully stated.

[6] This was held in Lydney &c. Co. *v.* Bird, 33 Ch. Div. 85; *s. c.* 24 Am. & Eng. Corp. Cas. 23. It is illustrated by the following cases, in none of which was the whole transaction set aside: Beck *v.* Kantorowicz, 3 Kay & J. 230; Emma Silver Mining Co. *v.* Lewis, 4 C. P. Div. 396; Bagnall *v.* Carlton, 6 Ch. Div. 371; Whaley &c. Co. *v.* Green, 5 Q. B. Div. 109.

§ 463. Deductions for Promoting Company. — In one of the authoritative English cases on this question, while the promoter was held bound to account for secret profits, he was allowed all sums *bona fide* expended in securing the services of the directors, and providing their qualifications, and in payments to the brokers and officers of the company, and to the public press in relation to the company.[1] But in a later case the Court of Appeal of that country, in an opinion delivered by the Lord Justice Lindley, refused to allow a fraudulent promoter the payments made by him in procuring the issue of shares, saying: "It appears to us wholly wrong to make the company pay for the issue of its own shares. No part of the capital of the company could be properly so applied." On the other hand, it was held that the promoter ought to be allowed legitimate expenses incurred by him in forming and bringing out the company, and that these sums would include six hundred pounds charged for the *report*, the *fees* paid to solicitors and brokers, and the sums paid for *advertising*, *printing*, etc.[2] The court refused to allow a sum which the promoter had expended in obtaining from another person a *guaranty to a sharetaker* who had been induced to subscribe for some of the shares.[3]

§ 464. Compromise of Suit against Vendors. — The fact that the company has compromised a suit against the vendors, for the rescission of the contract of sale, affords no defense, in an action against the promoters, to compel them to account for secret profits; since the promoters occupy toward the company a position entirely different from that of vendors, who are strangers to it.[4]

§ 465. Measure of Recovery in Equity. — It has been said that in such cases equity does not give damages, but decrees a restoration of the thing wrongfully taken, that is, the money received, or an equal sum, with interest.[5] The company recovers from the promoter the amount of profit which he has made out

[1] Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918.

[2] Lydney &c. Co. *v.* Bird, 33 Ch. Div. 85.

[3] *Ibid.*

[4] Bagnall *v.* Carlton, 6 Ch. Div. 371.

[5] McElhenny's Appeal, 61 Pa. St. 188.

of the secret agreement. This is not necessarily the round sum which he secretly received from the vendor of the property; nor, where the transaction has taken the form of a sale of the property by the vendor to him, and by him to the company, is it necessarily the round difference between the amount which he received from the company and the amount which he paid to the vendor; but it is the *net profit* which he has made out of the transaction — what went into his pocket beyond what would have gone there if no transaction had taken place. In other words, he must surrender to the company the sum he received, less the costs, charges and expenses properly incurred by him in the promotion of the company.[1] In taking an account of such profit, he would be credited with all sums *bona fide* expended by him in procuring the services of directors and providing their qualification, and all *bona fide* payments made to promoters and officers of the company, and to the public press in relation to the company.[2]

§ 466. Liability at Law for Secret Profits.— Although the right to relief in equity has not been doubted in any recent period, it seems to have become the settled law in America that promoters are liable to the corporation, when it comes into existence, in an action of *assumpsit*, or under the codes, in an action of the nature of *assumpsit*, for any secret profits which they have made in the matter of promoting the corporation and bringing it into existence. The leading American decision on the subject is the Pennsylvania case of Simons *v.* Vulcan Oil and Mining Co.[3] decided in 1869. It was there held that, where persons purchase land with a view of organizing a corporation to purchase it of them, and then organize such a corporation and sell the land to it, at a price in advance of what they gave for it, representing that the price paid by the corporation is the same price which they have paid to the original vendors, they are bound to restore to the corporation the difference between the price paid by them for the land and the price at which they sold it to the corporation; and that, for this difference, the corpora-

[1] Bagnall *v.* Carlton, 6 Ch. Div. 371; Emma Silver Mining Co. *v.* Grant, 11 Ch. Div. 918.

[2] Emma Silver Mining Co. *v.* Grant, *supra*, *per* Jessel, M. R.

[3] 61 Pa. St. 202; Thomp. Off. Corp. 172.

tion may maintain an action of *assumpsit* against them, although the gravamen of the action is *fraud* and *deceit*.[1]

§ 467. **Illustrations.**— In an *action at law* it appeared that two persons, whom we will call A. and B., connived together to make a profit through the promotion of a company. A. had purchased certain calico printing works for the sum of 15,000 pounds. He then associated B. with him as a promoter of a company to be formed for the purchase of the works from A.; and, for the purposes of the negotiations for the purchase, a contract, which a jury found to be a sham, was entered into between A. and B., pretending to sell the works by A. to B. for 20,000 pounds. The company was ultimately formed, its directors being nominees of A. and B., and the works were conveyed by A. and B. to the company for 20,000 pounds. There was a secret agreement between A. and B., that A. should pay to B. the sum of 3,000 pounds out of the purchase money. It was held that B., as a promoter of the company, was not entitled to this 3,000 pounds, but that the company were entitled to affirm the agreement made between A. and B., as an agreement made by B. with A. on their behalf, and to enforce it against A.; and that consequently they could recover the 3,000 pounds from A.[2] - - - - Secret profits, fraudulently made by a promoter of a company, may also be recovered from him, under the English view, by an action at law proceeding on the ground of *conspiracy*. This was held by the English Court of Appeal in the celebrated case of the Emma Silver Mining Co. *v.* Lewis.[3] There the defendants, who were metal brokers, having previously sold ore of an American mine on a commission of two and one-half per cent., arranged with one of the proprietors to assist in selling the mine to a company to be raised by him in England. He was to procure the appointment of the defendants as metal brokers of the company, at the usual rate of English commission, namely, one per cent., and he promised that the defendants should be liberally remunerated, to an extent at least of 500 pounds, for their assistance, and to compensate for the loss of the higher commission. They were, as he knew, acquainted with the facts detrimental to the reputation of the mine, and he promised the liberal remuneration to insure their silence respecting those

[1] The grounds on which such a recovery is supported were stated at large by Hare, P. J.— a very able judge, known to the American bar as a writer upon several of the leading titles of the law,— in his charge to the jury and in his rulings upon points submitted to him,— which charge and rulings were affirmed by the Supreme Court.

[2] Whaley &c. Co. *v.* Green, 5 Q. B. Div. 109.

[3] 4 C. P. Div. 396.

facts. The defendants assisted him in his endeavors to sell the mine to a company to be formed for the purchase of it, but left him to fix the price, get up the company and manage all the details respecting the sale. He procured the formation of the company and procured it to purchase the mine at the price of 100,000 pounds, half to be paid in cash and half in paid-up shares. The defendants were appointed metal brokers of the company at one per cent. commission; allowed themselves to be named in the prospectus as being ready to answer any inquiries relating to the mine, and in fact answered such inquiries; but kept silence with respect to the detrimental facts known to them. Payment having been made for the mine to the proprietor, 250 fully paid-up shares out of those received from the company were transferred by him to the defendants, and were subsequently sold, and the proceeds received by them. This transaction was not disclosed to the company. Thereafter the company brought an action against the defendants to recover the proceeds, as secret profits made by them as promoters. The judge left the question whether they were promoters, without any definition, to the jury, and it was held that this was no error. It was further held that the defendants were in a fiduciary relation to the company, and therefore liable to refund the secret profits, although the contract of sale was not rescinded. The jury found for the plaintiffs, judgment was entered on the verdict, and a rule for a new trial was discharged by the Court of Appeal.[1]

§ 468. Immaterial that Directors of the Corporation Knew of the Fraud. — The corporation is none the less defrauded, but the crime committed against its innocent stockholders and creditors is aggravated, by the fact that its directors, whose duty it is to protect them against the fraud, have knowledge of it, and concur in it, or, what is worse, participate in it. The knowledge of the directors of the fraud will not, therefore, prevent the corporation from maintaining an action at law against the promoters.[2]

[1] Emma Silver Mining Co. *v.* Lewis, *supra.* Unsuccessful action for damages by a shareholder against a promoter, on the ground that he had received promotion money not stated in the prospectus: Arkwright *v.* Newbold, 17 Ch. Div. 301. It was held that, although the action was brought in the chancery division, it must be decided on principles applicable to a common-law action for deceit, and that, as there was no arrangement, but only an expectation that the directors would receive promotion money from the company, the prospectus did not contain any statement on which such an action could be grounded.

[2] Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; *s. c.* Thomp. Off. Corp. 172.

§ 469. Liability for Fraudulent Representations. — While negative concealment is, in equity, tantamount to positive fraud where there is a *duty* to disclose the truth, yet the case which calls for the application of the foregoing principles is, if possible, stronger, where, through *fraudulent representations* and *devices*, a property is foisted upon a company by its promoters at a grossly excessive valuation. In such a case the company may maintain an action in equity against them, and also against its directors concurring in the fraud, to recover what it has lost thereby.[1] The same result is reached, in England, in the event of the insolvency of the company and its *winding up* under a statute, by placing the fraudulent promoters upon the *list of contributories*. Thus, where two of the promoters of an undertaking for the purchase and alteration of a theater issued a circular, stating that "the remodelling, redecorating and refurnishing will cost 12,000 pounds, and of this sum only 5,000 remains for subscription,"—it was held that, upon the winding up of the venture, the two promoters must be settled upon the list of contributories for all the balance of the unsubscribed capital above 12,000 pounds, — in other words, that they must make good their misrepresentation out of their pockets.[2] But, of course, if the representations are made *in good faith*, with an honest belief in their truth, no liability attaches to the promoters, if they should turn out to be erroneous in fact, — in other words,

[1] The ruling principle is found in the leading case of Charitable Corporation *v.* Sutton, 2 Atk. 400; *s. c.* Thomp. Off. Corp. 226, where Lord Hardwicke held that a corporation can maintain an action against *its directors* to recover money lost through their gross frauds or breaches of trust. The following cases are to the same effect: Society for Practical Knowledge *v.* Abbott, 2 Beav. 559; McKay's Case, 2 Ch. Div. 1; Overend & Gurney Co. *v.* Gibb, L. R. 5 H. L. 480; Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221; Phosphate Sewage Co. *v.* Hartmont, 5 Ch. Div. 394, 441. Pittsburg Mining Co. *v.* Spooner, 24 Am. & Eng. Corp. Cas. 1; St. Louis &c. R. Co. *v.* Tiernan, 37 Kan. 606; 15 Pac. Rep. 544. See also Joint Stock Discount Co., *v.* Brown, L. R. 8 Eq. 381; Land Credit Co. *v.* Fermoy, L. R. 5 Ch. 763; Panama &c. Tel. Co. *v.* India Rubber Co., L. R. 10 Ch. 515. As to the like liability of *directors*, see *post*, § 4144.

[2] Re Royal Victoria Palace Syndicate, L. R. 18 Eq. 661. In Rawlins *v.* Wickham, 3 De Gex & Jones, 304, a similar course was taken against one who had induced others to enter into a *partnership* with him by fraudulently misrepresenting the assets and liabilities, — he was compelled to make good his word.

they are *not guarantors*, in the fullest sense, of the absolute truth of their representations.[1] It has been thought by some courts that, while this doctrine is sound in its application to the fraudulent misrepresentations or concealments of the *agents* of *existing corporations*, it does not apply to the same acts committed by *commissioners* whose office it is to procure subscriptions to a future corporation.[2] But this conclusion rests on the fallacious idea that one cannot be agent of something not in being. Such a person acts for the future entity. As soon as it springs into existence, it derives the same advantages from the acts he has done for it as though it had been in existence when he did them. The conclusion follows, almost as a matter of necessity, that, as soon as the corporation is organized, he becomes its agent by relation; and this, as already seen, is the conclusion of the English courts, where the subject has been frequently considered, the commissioner there being called a "promoter." Frauds practiced by such a person, to induce persons to subscribe for shares in the future corporation will avoid the subscription, precisely as though the corporation had been in existence at the time when the fraud was committed.[3]

§ 470. Illustration. — Certain persons obtained control of a mining option for $20,000, and proceeded to form a corporation to complete the purchase. They represented to the persons who subscribed for the stock that it would cost $90,000 to purchase the option; the sum of $90,000 was accordingly paid for the option, of which $70,000 was appropriated by these persons to their own use, and the balance only was actually paid. It was held that an action might be maintained in the name of the corporation to recover the amount wrongfully appropriated by them in breach of their duty.[4] The fact that the promoters formed a corporation, and that such corporation passed a resolution to permit one of their number to subscribe for the whole of the capital stock, and to pay for it by a transfer of the mining option to the corporation, was regarded as no defense to the action against the promoters; since it appeared that, before this was done, an agreement had been made

[1] Petrie *v.* Guelph Lumber Co., 11 Can. S. C. 451; *s. c.* 15 Am. & Eng. Corp. Cas. 487.

[2] Smith *v.* Heidecker, 39 Mo. 157; Rutz *v.* Esler &c. Man. Co., 3 Bradw. (Ill.) 83, 88.

[3] *Ante,* § 443. See *post,* § 1460.

[4] Pittsburg Mining Co. *v.* Spooner, 74 Wis. 307; *s. c.* 24 Am. & Eng. Corp. Cas. 1; 5 Rail. & Corp. L. J. 566 (Lyon, J., dissenting).

with other persons to become members of the corporation, and that the transfer was not made to the corporation until after such persons had become members and furnished the money necessary to complete the purchase.[1]

§ 471. No Defense that the Corporation Raised the Money on an Illegal Issue of its Stock. — In such a case the promoters of a corporation, who are instrumental in the issue of the stock, cannot plead, in defense of an action against them for the breach of trust, that the issue of the stock was illegal and in violation of a statute. Speaking for the court on this subject it was said: "Having changed their position in regard to this money, by receiving it from the corporation as payment for the mining option sold to the company, they cannot now claim to hold it as money received by them as the agents of the corporation in making illegal sales of the stock of the corporation. The money paid to the corporation on such an illegal issue or sale of stock was, notwithstanding such illegal sale, the money of the corporation, as against all the world. The purchasers of such illegally issued stock could not recover back the money paid by them to the corporation upon such illegal transaction;[2] and if they cannot recover it back from the corporation, no one else can. The corporation, having the possession of the money, is, for all practical purposes, the owner of it; and, if these defendants take the money from the corporation in an illegal and fraudulent way, it is no defense to such illegal act that the corporation obtained the money by a violation of the statute in selling its stock. If A. obtains the title and possession of property from B. by some fraudulent device, and C. obtains the same property of A. by fraud, and A. brings an action against C. to recover the property back or for damages for fraud, it would be no defense for C. that A. had fraudulently obtained it from B. This would certainly be so, unless B. made a claim for the property against C. In this case the persons whose money came to the possession of the corporation cannot enforce any claim to it as against the corporation, and consequently they could not enforce a claim to it as against the persons to whom the corporation transferred it; and if the present stockholders were instru-

[1] *Ibid.*

[2] Citing Clarke *v.* Lumber Co., 59 Wis. 655, 661, 665.

mental in bringing this action in the name of the corporation, as they must be held to be, by bringing it in the name of the corporation, they affirm the right of the corporation to the money so received by it. By what rule of law have the defendants the right to challenge the title of the corporation to the money which was paid to them upon a sale of the mining option to the corporation? I am unable to perceive such right, especially in a case of this kind, where no other person can claim the money. Briefly, the foundation of the claim of the plaintiff is this: The corporation having in its possession the $90,000, the defendants, as agents and trustees of the corporation, sold their mining claim to the corporation for $90,000, and, acting for the corporation, they bought it for the corporation, and paid out its money to complete the purchase; and that, in making such sale and purchase, they so conducted themselves that they were not entitled as against the corporation, to retain the profits made on the sale, but held such profits in trust for the corporation. Under such circumstances, it appears to me wholly immaterial how the corporation became possessed of the money received by the defendants, unless they can show that some other person or party has a better claim to such money than the corporation.[1]

§ 472. Grounds of Recovery against Aiders and Abettors. — In such an action, where there is more than one defendant, in order to sustain a *joint recovery* against them, it is necessary to show that they were partners in the fraudulent scheme, or else that they participated in the proceeds of the fraud.[2] Thus, in the celebrated case of *Colt* v. *Woollaston*,[3] it was held just, that one of the defendants named Arnold, as well as the principal defendant Woollaston, should be charged; "for, as Woollaston was the first projector and procurer of the patent, and purchaser of the land, so Arnold was his trustee, accepted the conveyance, was the treasurer, received the money and gave the receipts, was partner in the fraud, and plainly *particeps criminis*."

[1] Pittsburg Mining Co. *v.* Spooner, 74 Wis. 307, 325; *s. c.* 24 Am. & Eng. Corp. Cas. 1, 13; 42 N. W. Rep. 259; opinion by Taylor, J.

[2] Simon *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; *s. c.* Thomp. Off. Corp. 172.

[3] 2 P. Wms. 154; *s. c.* Thomp. Off. Corp. 169.

§ 473. Whether Liability of Managing Committee-man in Equity for Fraud is Joint or Several. — In a proceeding in equity, where the object is to do complete justice to all, *all the members* of a managing committee of the company who have concurred in a misapplication of the funds placed in their hands for the purpose of promoting the company, ought to be charged with the loss which the beneficiaries have sustained, and it ought not to be thrown entirely upon the sub-committee who disbursed the money under the orders of the managing committee. Thus, in a case under the English winding-up acts, 1848, 1849, it appeared that five individuals, with several others, were members of the managing body of an abortive railway company; that these five individuals were appointed a finance committee, and that power was lodged in any three of them to sign checks, which were to be countersigned by the secretary. These five persons, acting by direction of the managing body, had employed the funds of the company, to a large amount, in buying up the shares of the company. The master charged these five persons with the moneys which they were thus instrumental in applying to the purchase of the shares. This order was discharged by Vice Chancellor Parker, on the ground that it did imperfect justice between the persons who were guilty of the breach of trust; since, for the money paid, according to the master's order, the other persons who had directed the misapplication of it, would have the benefit of its being brought back. Some other course, he thought, ought to be adopted, so as to do complete justice between all the parties.[1] It does not clearly appear from the report of this case whether the shares in question were bought in for the personal benefit of the managing committee, or to be held by them in trust for the company, for its supposed benefit. In either case it would have been a breach of trust, because the moneys were not paid in for such a purpose. In the former case it would be a breach of trust in the nature of embezzlement or larceny; and, if such were the facts, the decision is incapable of vindication; for when did a court of equity sit for the purpose of enforcing contribution among thieves?

§ 474. Who may Bring the Action in Equity.— Primarily, the right of action lies in the defrauded corporation, as already seen; but if the directors have connived with or participated in the fraud, and, being in control of the machinery of the corporation, refuse to bring the action, a court of equity will open its doors to an action by a defrauded shareholder, on behalf of himself

[1] Carpenter's and Weiss' Cases, 5 DeG. & Sm. 402.

and the other shareholders except the defendants, upon his showing that the directors have refused to allow the action to be brought in the name of the company.[1] In New York it is held that the shareholders in a company, who have been defrauded by such a secret arrangement on the part of the promoters, are proper plaintiffs in a suit in equity to compel the fraudulent promoters to account for their secret profits.[2] That such an accounting is a proper subject of equitable cognizance has never, it is conceived, been the subject of doubt. It has been held that in such a suit in equity every person interested in the result, whether as being liable to pay or entitled to participate in the profits retained by the promoters, if any are recovered, is a proper *party*, and that an equitable action for such an accounting is properly brought by two or more *bona fide* subscribers, claiming as such, and also as assignors of other subscribers, against the promoter who has committed the fraud, or his personal representative, making all the other subscribers parties defendant.[3]

§ 475. Great Latitude Allowed in Admission of Evidence. — In such an action it has been said that great latitude is allowed in the admission of evidence.[4] And this is a general rule in the law of fraud, for fraud is so subtle and evasive that, without wide latitude in admitting evidence in cases involving fraud, it would be impossible to trace its vermiculations through the slime.[5] It has, therefore, been held competent in an action by a corporation to recover of its promoters fraudulent and secret profits retained by them, and to give in evidence false and fraudulent prospectuses published by them to induce persons to subscribe for shares of the company; for, although the action is in form *ex contractu*, it is chiefly supported by evidence of *fraud*.[6]

§ 476. When the Fiduciary Relation between the Promoter and the Company Commences — Gover's Case. — It is obvious

[1] Atwool *v.* Merryweather, 37 L. J. Ch. 35. Compare Beatty *v.* Neelon, 13 Sup. Ct. Can. 1; *s. c.* 19 Am. & Eng. Corp. Cas. 236; *post*, Ch. 89.

[2] Getty *v.* Devlin, 70 N. Y. 504; *s. c.* 54 N. Y. 403; 9 Hun (N. Y.), 603.

[3] *Ibid.*

[4] Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; *s. c.* Thomp. Off. Corp. 172.

[5] Massey *v.* Young, 73 Mo. 260.

[6] Simons *v.* Vulcan Oil &c. Co., 61 Pa. St. 202; *s. c.* Thomp. Off. Corp. 172.

that if a man *has* already purchased certain property and got a good bargain, it is no fraud to organize a company and sell the property to it at an advance. This is not at all what the rule means. It means that he must disclose to the company what he gave, because he owes it to those toward whom he stands in a fiduciary relation to make such disclosure. They have a right to be put in possession of all the material facts concerning it which he possesses. It is only when the relation of trust between him and the company does not exist, and when he is dealing with the company at arm's length as with a stranger, that he is entitled to conceal such facts from them. Upon this point Gover's Case,[1] turned. In this case M. agreed with the owner of a patent to purchase it for £65,000, to be paid partly in cash, and partly in shares of a company which he agreed to form for that purpose. M. then proceeded, in pursuance of the agreement, to promote the company which was to purchase the patent, and, three months afterwards, he was enabled to enter into a contract with a person styling himself trustee of the proposed company to sell the patent to such trustee for £125,000, to be paid partly in cash and partly in shares of the company. Shortly afterwards the company was formed, M. being a director in it. A prospectus was issued which did not mention the first agreement of purchase, and, on the faith of this prospectus, G. purchased shares in the company. It was held by James and Mellish, L. JJ., affirming an order of Vice Chancellor Bacon, that G. could not have her name removed from the list of shareholders. Brett, J., dissented. This case is not of general value as authority, because it turned for the most part on the meaning of § 38 of the English Company's Act, 1867, which reads as follows: "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company, or otherwise; and any prospectus or notice, not specifying the same, shall be deemed fraudulent on the part of the promoters, directors and officers of the company, knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."[2]

[1] L. R. 20 Eq. 114; *s. c.* (affirmed) 1 Ch. Div. 182.

[2] It is to be observed, however, that Gover's Case did not really decide that the case was not within the above statute. It held that the shareholder could not be retired from the list of contributories; not that she could not maintain an action under the statute against the person who had practiced the fraud upon her. Upon this ground Lord Cockburn distin-

ARTICLE IV. NON-LIABILITY OF THE COMPANY FOR CONTRACTS OF PROMOTERS.

§ 480. Contracts of Promoters not Binding on Future Company. — The corporation must have a full and complete organization and existence as a legal entity, before it can enter into any kind of a contract or transact any business. Nor have the corporators power to bind it by contract unless authorized by the charter.[1] The American doctrine is that the engagements of promoters do not bind the future corporation, unless the corporation expressly or impliedly ratifies them.[2] It may, of

guished Gover's Case in his judgment in Twycross *v.* Grant. 2 C. P. Div. 469, 536. But it is to be observed that Craig *v.* Phillips, 3 Ch. Div. 722, cited in a preceding section, was an action against the promoter for an alleged fraud, and it was there held by Vice Chancellor Bacon that the case was not within the 38th section of Companies Act. The doctrine of this case was denied by Lord Cockburn in his judgment in the Court of Appeal in Twycross *v.* Grant, *supra*, and it is clear that it is overruled by that case, and is opposed to the doctrine of the Queen's Bench in Charlton *v.* Hay, 31 L. T. (N. S.) 437, and to the views expressed by Mr. Justice Honeyman in Cornell *v.* Hay. L. R. 8 C. P. 328. Independently of the statute, both Gover's Case and Craig *v.* Phillips seem opposed in principle to the later case of Erlanger *v.* New Sombrero Phosphate Co., 3 App. Cas. 1218 (affirming *s. c.* 5 Ch. Div. 103); 4 Cent. L. J. 510; *ante*, § 459; and in the opinion of the writer, neither of them is now entitled to be considered authority.

[1] Gent *v.* Manufacturers &c. Ins. Co., 107 Ill. 652, affirming *s. c.* 13 Bradw. (Ill.) 308; *s. c.*, 6 Am. & Eng. Corp. Cas. 588; Munson *v.* Syracuse &c. R. Co., 103 N. Y. 58; *s. c.* 29 Am. & Eng. R. Cas. 377; Joslin *v.* Stokes, 38 N. J. Eq. 31; *s. c.* 5 Am. & Eng. Corp. Cas. 98.

[2] Rockford &c. R. Co. *v.* Sage, 65 Ill. 328; Safety Deposit Life Ins. Co. *v.* Smith, 65 Ill. 309; Western Screw &c. Co. *v.* Cousley, 72 Ill. 531; Paxton *v.* Bacon Mill &c. Co., 2 Nev. 257; Joy *v.* Manion, 28 Mo. App. 55, 60; Hawkins

course, make them its own by express agreement.[1] And this it may do precisely as it might make similar contracts in the first instance. If the nature of the contract is such that formal action of its board of directors would not be necessary to the making of it in the first instance, its adoption when made for it by its promoters will not require that formality.[2] So, it may, of course, impliedly ratify such engagements, by accepting and retaining any benefits which accrue to it therefrom, in which case it becomes liable, not on the strict theory of contract, but on the principle of *estoppel*.[3]

§ **481. Illustrations.**— Accordingly, the agreement of parties, intending to form a corporation and engaged in forming it, to put in property as stock, but which stock was never subscribed, did not bind the corporation, nor did the property become the property of the corporation, although it was used by it.[4] - - - - Until a *mutual fire insurance company*, projected under the laws of Illinois, has fully completed its organization, by filing the certificate of the auditor of public accounts with the county clerk, that the corporators have deposited the requisite capital stock, the transaction of business in the name of the corporation is unauthorized. The corporators or promoters of such a company are authorized to take applications for insurance, and *premium notes*, as a fund or capital to authorize the granting of the charter, and enable the company to transact its business when organized; but, prior to its organization, the making of an application and the giving of a premium note is only a *proposition to insure* in the company, and to receive a policy when the company shall have become capable of contracting and transacting business.[5] - - - -

v. Mansfield Gold Mining Co., 52 Cal. 513; Munson *v.* Syracuse &c. R. Co., 103 N. Y. 58; Morrison *v.* Gold Mining Co., 52 Cal. 306; Carmody *v.* Powers, 60 Mich. 26; *s. c.* 26 N. W. Rep. 801.

[1] Rockford &c. R. Co. *v.* Sage, 65 Ill. 328; Reichwald *v* Commercial Hotel Co., 106 Ill. 439; Wood *v.* Whalen, 93 Ill. 153; Bell's Gap Railroad Co. *v.* Christy, 79 Pa St. 54 (reasoning of the court); Low *v.* Railroad Co., 45 N. H. 370; Paxton Cattle Co. *v.* First Nat. Bank, 21 Neb. 621; *s. c.* 33 N. W. Rep. 271.

[2] Battelle *v.* Northwestern Cement &c. Co., 37 Minn. 89; *s. c.* 33 N. W. Rep. 327.

[3] Edwards *v.* Railway Co., 1 Mylne & C., 650; Paxton Cattle Co. *v.* First Nat. Bank, 21 Neb. 621; *s. c.* 33 N. W. Rep. 271; Low *v.* Railroad Co., 45 N. H. 370 (leading case); Bell's Gap. R. Co. *v.* Christy, 79 Pa. St. 54 (doctrine recognized); Rockford &c. R. Co., *v.* Sage, 65 Ill. 328.

[4] Stowe *v.* Flagg, 72 Ill. 397.

[5] Gent *v.* Manufacturers' &c. Ins. Co., 107 Ill. 652, affirming *s. c.* 13 Bradw. (Ill.) 308; *s.c.* 6 Am. & Eng. Corp. Cas. 588.

An attempt was made to organize a corporation under the general law of Illinois, with a capital stock of $100,000. After part of the stock was subscribed, the stockholders held a meeting, and employed a *superintendent* to attend to work being done for the proposed corporation, which he commenced doing; but afterwards, when it was ascertained that the requisite subscription of stock could not be obtained, he quit work. Most of the stockholders afterwards formed *another company* with a capital stock of $50,000, for the same purpose as the first one, and completed their organization and incorporation. It was held that, even if the first company had completed its organization, the superintendent could not have recovered against it for his services, much less against the new company.[1] - - - - The proprietors of a *mine* contracted an indebtedness for the purpose of developing it. Afterwards, with others, they formed a corporation in which they owned three-fourths of the stock, and to which they conveyed the property for a valuable consideration. It was held that the corporation was not liable for the indebtedness without a promise to pay it.[2] - - - - An agreement with individuals that, when they become incorporated they will give the other contracting party a certain amount of the paid-up stock of the corporation, is not a dealing with the corporation itself, nor will it bind the corporation when organized, but is merely the personal engagement of the promoters.[3] - - - - A good illustration of the principle under consideration is found in numerous cases which hold that, in an action against a *subscriber* by the corporation upon his contract of subscription, evidence that certain promoters *guaranteed that the route would pass* near a certain tract of land, and that it did not pass near it, will not discharge the subscriber, although he subscribed in reliance upon the statement, in the absence of evidence tending to show a fraudulent intent;[4] since such a guaranty is not binding on the company.

§ 482. Engagement with Promoters is a Proposal to Corporation.— Again, an obligation assumed toward an intended corporation, through its promoters, may, in legal effect, stand as a *proposition* for a contract, and may become such when accepted by the corporation after it comes into being. A frequent illustration of this is found in cases where subscriptions are made to the capital stock of an intended corporation before it is organized. In such cases the corporation, when organized,

[1] Western Screw &c. Co. *v.* Cousley, 72 Ill. 531.

[2] Paxton *v.* Bacon Mill &c. Co., 2 Nev. 257.

[3] Carmody *v.* Powers, 60 Mich. 26.

[4] Braddock *v.* Philadelphia &c. R. Co., 45 N. J. L. 363; *s. c.* 16 Am. & Eng. R. Cas. 436; *post,* § 1394.

may treat the subscription as a *proposal*, intended to be made to it, and may accept it and maintain an action against the subscribers thereon.[1] But it has been held that, where there is no formal act of acceptance on the part of the corporation when it comes into existence, prior to the bringing of an action, it cannot maintain an action on such a promise made prior to its organization to its promoters in its behalf.[2]

§ **483. Illustration.**— A *declaration*, in an action by a corporation, alleging the following facts, was held *bad on demurrer:* — That certain persons agreed to form a corporation under general laws, if they could obtain certain machinery from the defendant, and to build a factory for the manufacture of certain goods; that such persons informed the defendant of the premises, and, in the name and for the benefit of the proposed corporation, applied to the defendant, who was a manufacturer of the machinery desired, for such machinery, and informed the defendant that the proposed corporation would proceed with its organization, and would build a factory only in case a contract could be made with the defendant for the machinery; that thereupon the defendant made two contracts in writing, one of which was under seal, to furnish the corporation with the machinery upon certain specified terms; that afterwards, in anticipation of the defendant's fulfilling his agreement, a factory was built for the defendant; that said machinery could not be procured otherwise than from the defendant, which he well knew; that the persons named, in behalf of the proposed corporation, before its organization was completed, were always ready to receive and pay for said machinery, and frequently demanded the same, but the defendant neglected and refused to furnish said machinery or any part thereof; and that said corporation was duly organized and existed under the general laws.[3] The court, speaking through W. Allen, J., said: "The writings, as between the plaintiff and the defendants, show no more than proposals by the defendants, revocable at any time before acceptance by the plaintiff after its incorporation. The fact that one is under seal is immaterial in this respect. The only consideration shown for the defendants' promises is the acceptance of them by the plaintiff, and the promise to accept and pay for the goods implied in that; and the acceptance must be by some act or assent of both parties which will fix the rights of both, and is as essential to a promise under seal as by parol. The defendants could not be bound, until such acceptance by

[1] *Post*, § 1170.

[2] Penn Match Co. *v.* Hapgood, 141 Mass. 145.

[3] Penn Match Co. *v.* Hapgood, 141 Mass. 145.

the plaintiff as would give them a right of action against it for refusal to accept and pay for the goods. There is no allegation of acceptance by the plaintiff after its incorporation. The demand is not stated as an act of acceptance perfecting the contract, but, in connection with the refusal, to show a breach of an existing contract. . . . A corporation may become bound to fulfill a contract made in its name and behalf in anticipation of its existence, by afterwards accepting the benefits of the contract, as it may acquire a right to enforce such a contract against the other party by his acceptance of performance by the corporation.[1] . . . In the case at bar the formation of the corporation and procuring a building were no part of the contract, or of the consideration of it. There was no agreement to do the acts, and the doing of them was not made by the parties a condition upon which the contract was to arise. The promise or proposals of the defendants, though a motive for doing the acts by the plaintiff, are not alleged to have been inducements offered by the defendants, nor are the acts alleged to have been done at their request. The defendants are not so connected with the acts to be done by the plaintiff that they would have a right to regard the doing of them as the acceptance of the proposals, so that, without other act of acceptance, by the plaintiff, they could have maintained an action against it upon refusal to accept and pay for the goods." [2]

§ 484. Not Liable for Services Rendered in Promoting it.— A claim for money expended and time employed for the organization and benefit of a proposed corporation, cannot ordinarily be regarded and enforced as a debt of the after-formed corporation.[3] In an action against a railway company to recover the value of services performed before its incorporation, in procuring its charter, in making surveys, it has been held that there can be no recovery, in the absence of proof that a *majority* of the corporators or promoters of the corporation authorized the rendition of the services.[4] But it has been ruled that where, after the charter and before the organization of a corporation, services are rendered which are necessary to complete the organization, and, after it has been perfected, the corporation *elects to take the*

[1] Citing Low *v.* Connecticut &c. R. Co., 45 N. H. 370, and referring to the common liabilities of subscribers of stock.

[2] Penn Match Co. *v.* Hapgood, 141 Mass. 145, 149. Compare Dayton &c. Turnp. Co. *v.* Coy, 13 Oh. St. 84.

[3] Marchand *v.* Loan and Pledge Assoc., 26 La. An. 389.

[4] Bell's Gap Co. *v.* Christie, 79 Pa. St. 54; *s. c.* 21 Am. Rep. 39.

benefit of such services, knowing that they were rendered with the understanding that compensation was to be made, — it will be held liable to pay for the services, upon the ground that it must take the burden with the benefit; but that, "no promise to pay would be implied from the fact that such services were rendered at the request of any number of the corporators less than a majority."[1] The principle of estoppel, invoked in cases already alluded to,[2] has a just and undoubted application, where the circumstances are such that the corporation is at liberty either to accept or reject the benefit of the contract which the promoters have assumed to make in its behalf. A more interesting question arises where the services are of such a nature that the corporation *cannot reject them*, — as in the case of services rendered in bringing the corporation into existence. In such a case there is judicial authority for the proposition that the corporation will be bound. The court, struggling for a principle on which to rest its liability, placed it upon the theory of *implied contract*.[3]

§ 485. Illustration. — In a leading case on this subject, the services were rendered by the plaintiff at the request of certain persons named in the charter of the corporation, in bringing it into existence; and the plaintiff, to enlist the services of a third person, agreed to give him "his best horse," when the contemplated railroad should reach a certain town, and he accordingly did give him such horse. The plaintiff brought an action of *assumpsit* against it, to recover for the value of the services and the horse. "The court charged the jury that, by the charter, all associates are corporators; that, by the law of Vermont [the State creating the corporation], each corporator is charged with the duty of rendering necessary services to carry out the provisions of the charter and to effect an organization; and that, if any one performs necessary labor, and expends money in the discharge of such duty, and his action is assented to by the corporators, or, being known to them, is not objected to, and the corporation is organized and enjoys the benefit of such services, the law implies a promise to pay for them; that every person interested in the objects for which an act of incorporation is granted, and who, with the knowledge and without the objection of

[1] Low *v.* Connecticut &c. R. Co., 45 N. H. 370, 375. Compare Preston *v.* Liverpool &c. R. Co., 7 Eng. L. & Eq. 124.

[2] *Ante*, § 480.

[3] Low *v.* Connecticut &c. R. Co., 45 N. H. 370.

the corporators, and with the assent and at the request of some of them, shall unite in assisting in the organization of the corporation, with a *bona fide* intention of becoming a member, by taking stock, and shall, as soon as the books are opened, take stock, by subscribing for shares, is to be deemed an associate from the commencement of his labors, within the purview of the act of incorporation in this case, so far as the liability of the corporation for his services is concerned; that in this case, if some few of the corporators mentioned in the charter requested the plaintiff to perform the services now in suit, or if the greater number of those who, like himself, became associates, and in the manner that he did, — by subscribing for stock in the road and becoming members of the corporation,— either requested the plaintiff to render such services or knew of them and assented thereto, he will be deemed to have sufficient authority to render the services, and the law will raise a promise of the corporation to pay for said services, if necessary and reasonable." To this instruction the defendant excepted. "The defendant requested the court to instruct the jury that, prior to the organization, no person or persons were competent to bind the corporation by contract, express or implied; that, prior to the organization, it would require the concurrence of a majority of the corporators named in the charter to bind the corporation by contract; that no subscription for stock could make the subscribers associates, within the meaning of the charter, before organization; that no intention to subscribe for stock, nor any of the acts done in furtherance of the objects of the enterprise could have that effect; that no one would become an associate within the meaning of the charter, except after the organization, by being a subscriber for stock; that the corporation could be bound by no implied contract arising before organization; that the plaintiff is not entitled to recover anything on account of the horse delivered by him to Addison Gilmore, nor for the services performed at Montpelier in procuring a division of the charter, being of the kind called 'log rolling.'" The court declined to give this instruction and the defendant again excepted. "But the court did instruct the jury that the corporation would be bound to pay for the horse delivered to Gilmore, if they found, upon consideration of all the evidence, and the nature of the employment, that Low was authorized to make such a contract in behalf of the corporation, and did so make it, and not otherwise. . . . The jury returned a verdict for the plaintiff . . ." which the defendants moved to set aside by reason of the preceding exceptions. The Supreme Court refused to set it aside, on the ground named, but set it aside on other grounds. In its opinion, which is a long one, the court, among other things, say: "The great question is, whether the plaintiff is entitled to recover of the corporation, in any

form, for services rendered by him antecedent to its organization, but which were necessary to enable it to complete that organization; and if so, whether the action of *assumpsit* can be maintained. In considering the first question, it will be assumed for the present that the services were necessary; that they were rendered at the request of one or more of the original corporators, or of those who were associated with them; and that the corporation accepted those services after its organization, and enjoyed the benefit of them. Under such circumstances we are inclined to the opinion that it would become the duty of the corporation to pay for such services, and that in some form this debt could be enforced. . . ." The court then considered the decisions in England and in other jurisdictions, and, after pointing out that in England resort is had to *equity* to enforce the liability, proceeded: "The question then is whether an action *at law* can be sustained in New Hampshire to enforce such claims, or whether resort can be had to equity alone. The objection to a recovery in a suit at law is purely technical, but it must nevertheless prevail if it be well founded. We are inclined to think, however, that it is no violation of settled principles to hold that a suit at law may be maintained to enforce the obligation to pay for services rendered in the manner described, and of which the corporation after its full organization has taken the benefit. It it were true that, at the time the services were rendered, the corporation had no capacity to make a contract, — which is by no means clear after the charter has been accepted, — still if the services were rendered for the corporation upon the promise of the corporators that they should be paid for by it when its organization was perfected, and after *that* the corporation had adopted the contract and received its benefits, we think that, upon a maxim that a subsequent ratification is equivalent to a prior request, it may well be held that a promise to pay will be implied. Upon this principle a person may sue upon a contract made in his name by one assuming to have authority, but having none in fact. So, the title of an administrator will relate back to the death of the intestate, so as to entitle him to sue for the price of goods sold by one assuming to act for the administrator whoever might be afterwards appointed. . . . And still at the time of such sale there was no one in existence having capacity to make a contract as administrator. So, if one without authority buy goods for another, but afterwards the other receives them, this is equivalent to a previous request. . . . In such cases it can avail nothing by way of defense, to show that, in fact, the party had no capacity to make such antecedent request, or to bind himself by a contract, as in the case of a corporation that was not organized at all, or imperfectly, any more than to show that, in point of fact, there was no such request or no contract made. But the promise

is implied by law from the fact that the party, when it *had* capacity to contract, has taken its benefits, and, therefore, must be deemed to have taken its burthens at the same time; and he is estopped to controvert it either by showing a want of capacity to make a contract, or that none in fact was made. Upon the same principle, a person entering into a contract with a corporation in their corporate name, is estopped to deny that it is duly constituted. . . . The case of an infant is in point. He has not capacity to bind himself by a contract except for necessaries, but if, after he arrives at full age, he apply the goods to his use, he is bound to pay as he had promised. So here, if the corporation, after its organization, has elected to receive the benefit of services rendered for it prior to such organization, the law may well imply a promise to make reasonable compensation for them. To bind the corporation, however, by such ratification, it would be essential that it has previous *knowledge or notice* of the existence of such claim, or of the material facts upon which it is founded; or, at least, that it was put upon inquiry in respect to it. . . . The case before us stands much upon the same ground as a promise *to* a corporation before it is organized, to take and pay for shares in its capital stock, which may, when adopted after organization, be enforced in a suit at law. Upon these principles the instructions to the jury that, if a corporator perform necessary labor and expend money in carrying out the provisions of the charter and to effect an organization, and this is assented to by the corporation, or being known to them is not objected to, and the corporation is organized and enjoys the benefit of such services, the law implies a promise to pay for them are, we think, substantially correct. Indeed, it would be immaterial whether such services were rendered by a corporator or another, because the subsequent ratification is equivalent to an antecedent request; but we think that, without such ratification, either express or implied from taking the benefit of such services, the law would raise no such promise to pay, from the mere fact that the plaintiff was requested to render them by one of the original corporators as associates." While, as above stated, the court expressed no disapproval of the rulings of the trial court on the instructions, it did order a new trial, but on grounds which related to the admissibility of evidence.[1] It is to be regretted that the court did not advert to the *impossibility* of the corporation rejecting the benefits accruing from the services, owing to their nature. It could not reject *such* benefits without uncreating itself.

§ 486. Limitations of Rule of Corporate Liability. — A limitation of the rule which makes the corporation liable in such

[1] Low *v*. Connecticut &c. R. Co., 45 N. H. 370.

cases is, that the services must have been *necessary* and *reasonable*, and must have been performed under a contract with the promoter or promoters of the corporation assuming to act in its behalf, and with the *intention* and *expectation* that they shall be *paid for* by the future corporation, and not as mere *gratuities*,[1] nor on the mere credit of the individuals at whose immediate request they are rendered. In a case involving this question, which was before it on a second appeal, the Supreme Court of Arkansas, speaking through Eakin, J., have said: "It was there announced [referring to the opinion delivered on the former appeal] that the doctrine cannot apply to cases in which private persons, contracting exclusively upon their individual credit, afterwards created a corporation for the more convenient management and enjoyment of the benefits acquired by the contract. This is obvious from the consideration that the enhanced value of the property so benefited, or the rights so acquired by individuals, are estimated and allowed by the corporation subsequently taking it, and shares are issued accordingly. It would be unjust to other stockholders to require the corporate body to pay again for the labor or material which enhanced this value. That obligation should still rest upon the original contractors, upon whose credit the work was done or the material furnished. It may be illustrated by supposing that the proprietors of an eligible site for a manufactory should contract, upon their individual responsibility, for the erection of suitable buildings, the addition of the necessary appurtenances, and the acquisition of water privileges and rights of way, with a view to forming a corporation for manufacturing; and should afterwards form one with others, who subscribe for shares and put in their property for shares at its enhanced value. It would be unjust, in the absence of any claim of lien, to hold the corporate body liable for the improvements. The services performed must be intended at the time to inure to the benefit of the future corporation; must be made or done in its behalf, and with the expectation

[1] "Of course, to entitle the plaintiff to recover, such services must have been necessary and reasonable, and rendered not gratuitously, but with the understanding and expectation that they were to be paid for." Bellows, J., in Low *v.* Connecticut &c. R. Co., 45 N. H. 370, 378.

and confidence that the company will be bound, and not the credit of the individuals.[1]

§ 487. Services Rendered at the Request of all the Corporators. — The view has been put forward, and upon grounds which seem just, that where an association of individuals unite to carry on a certain business, and, before being incorporated, contract debts, and afterwards become incorporated *without taking in any outside persons* or outside capital, the corporation may be liable *in equity* for the payment of such debts. "Under such circumstances the property of no one but those who contracted the debts and were originally liable would be taken or subjected to the payment of it. The same persons continue the same business, with the same property, with no substantial change except in name. In such a case there is no reason why, in equity, the corporation should not be primarily liable for the debts, as it has succeeded to the property of the association."[2]

§ 488. Rule not Applicable where Third Persons Join the Corporation. — But it has been pointed out that this rule could have no just application where a corporation is formed with a capital consisting in part of the property of the pre-existing association, and in part of the property contributed by *new corporators*, who had no connection with the association. Speaking with reference to such a state of facts, it was said: "If the rule contended for by counsel for appellant be the law, the property of a stranger to the contract of indebtedness, who may have no knowledge of its existence, or even the means of ascertaining it, would be subjected to the payment of the liabilities of individuals with whom he may have associated himself in a common enterprise or business. The injustice of such a rule is so apparent that no subtlety of reason can well disguise it. The general rule of law is that none are liable upon contract except those who are parties to it; but here it is sought to charge an entire stranger to the contract with the responsibility of discharging it. . . . The case of an incoming partner is analogous

[1] Perry *v.* Little Rock &c. R. Co., 44 Ark. 383, 395.

[2] Paxton *v.* Bacon Mill &c. Co., 2 Nev. 257, 260, opinion by Lewis, C. J. Compare *ante*, §§ 265, 375.

to this, and it is universally held that he is not chargeable with the liabilities of the firm contracted before he became a member. If, instead of incorporating, the proprietors of the mill and Bacon mining ground had formed a partnership, the authorities are uniform, that, without a promise by the new firm, the mill proprietors would not be holden for the debts of the old firm."[1] It was also pointed out that any *liens* upon the property of the associates would follow it into the hands of the corporation; and further, that the members of the original association continued personally liable as if no incorporation had taken place, and that their interest in the corporation might be seized and sold on execution.[2]

§ 489. Distinction between Cases where the Remedy is in Equity and at Law. — Where the contract made by the promoters is intended to inure to the benefit of the future corporation when organized, the other contracting party may, under circumstances, acquire an equity to have the contract carried into effect. But it becomes a *legal right* only where the corporation affirms the contract, or does some act from which an affirmance may be implied. At law the rule obtains that corporations can not be bound merely by acts done or promises made by others in their behalf before they come into existence, and this on the simple conception that there is no privity of contract.[3]

§ 490. Illustrative Cases where the Corporation was Held Liable on the Theory of Estoppel. — It may be useful to refer to some other cases, where the corporation was held liable on the theory of *implied contract*, or of *estoppel*, or on the reason that it could not

[1] Paxton *v.* Bacon Mill &c. Co., 2 Nev. 260, opinion by Lewis, C. J.

[2] *Ibid.* See Chicago Coffin Co *v.* Fritz, 41 Mo. App. 389.

[3] This principle is stated in Perry *v.* Little Rock &c. R. Co. 44 Ark., 383, 394. It was the ground of decision in Bommer *v.* American Spiral &c. Co., 81 N. Y. 469, where an action in the nature of an action at law was sustained on the ground of a ratification. See also Perry *v.* Little Rock &c. Co. (on a former appeal), 37 Ark. 164, where there is a full discussion of the subject. It was there announced that the doctrine cannot apply to cases in which private persons, contracting exclusively for their individual benefit, afterwards create a corporation for the more convenient management and enjoyment of the benefits acquired by the contract. The same doctrine is found in the leading case of Low *v.* Connecticut &c. R. Co., 45 N. H. 370; *ante*, § 485.

accept and retain the benefit and at the same time deny the liability. After articles of association had been signed by the promoters of a cattle company, but before they were recorded or filed, the promoters elected a president of the corporation, who, in their presence and with their approval, executed and delivered to A. a promissory note in payment of property, which A. sold and delivered professedly to the corporation. The corporation subsequently used the property in its business. The note having passed into the hands of a bank by indorsement, it was held, in a suit by the bank against the corporation on the note, that the corporation was liable.[1] - - - - On like grounds, it has been held that an agreement among parties owning a mine, who expect to become incorporated but have not become so, that a person shall be entitled to a certain number of shares of stock of the proposed company, cannot be enforced against the corporation after its organization in an action for damages for the conversion of the shares, because it is not the contract of the corporation.[2] - - - - A hotel company was organized with a capital of $160,000, which was all subscribed by one of the corporators, except three shares of $100 each, none of which were ever paid. At the time of the organization the principal stockholder, who was elected president, was the owner of a large amount of hotel furniture, subject to a chattel mortgage of $115,000. This he turned over to the company in payment of his subscription, in pursuance of an arrangement made prior to the organization; and the company, in pursuance of the same arrangement, gave its notes, secured by a chattel mortgage on the same property, to release it from the prior incumbrances; and such property constituted the sole assets of the company. It was held that, so far as the hotel company was concerned, it had received a full consideration for the notes and mortgage given, and that they were valid obligations.[3]

[1] Paxton Cattle Co. *v.* First Nat. Bank, 21 Neb. 621; *s. c.* 33 N. W. Rep. 271.

[2] Morrison *v.* Gold Mining Co., 52 Cal. 306; Hawkins *v.* Mansfield Gold Mining Co., *Id.* 513.

[3] Reichwald *v.* Commercial Hotel Co., 106 Ill. 439.

CHAPTER XI.

IRREGULAR AND DE FACTO CORPORATIONS.

ARTICLE I. DE FACTO CORPORATIONS.

§ 495. Divergence of Views on the Subject of de Facto Corporations.— It is impossible to formulate a rule on the subject of *de facto* corporations, which will be applicable in all American jurisdictions, or which will receive uniform support from the decisions in any one such jurisdiction. Those decisions oscillate between two extreme views: 1. That where a body of men act as a corporation and in the ostensible possession of corporate powers, it will be *conclusively presumed*, in all cases except in a direct proceeding against them by the State to vacate their franchises, that they are a corporation. 2. That the con-

ditions named in statutes authorizing the organization of corporations are *conditions precedent*, and must be strictly complied with or the corporation does not exist; and that the want of compliance with any one condition precedent may be shown by any one, in a private litigation with the pretended corporation, unless he has *estopped* himself by his conduct from challenging its corporate existence, and frequently without reference to the question of estoppel. It is proposed to consider this subject now, disconnecting it, as far as possible, from mere questions of pleading and procedure, which are reserved for a future chapter.[1]

§ 496. When Rightfulness of Corporate Existence Presumed.— We may commence this discussion with the most attenuated thread of legal doctrine, the *presumption of right-acting*. Men are presumed to do rightly what they do, unless the contrary appears on the very face of their proceedings. In apparent conformity with this principle, we find it sometimes laid down that persons acting publicly as *officers* of a corporation are presumed rightfully in office, and that all necessary steps in order to enable the corporation to act as such, are presumed to have been taken.[2] Another expression of this doctrine is that, when it is shown that a charter has been granted, then those in possession and actually exercising the corporate rights, shall be considered as rightfully there against wrong-doers, and all those who have treated or acted with them in their corporate character. The sovereign alone has a right to complain; for, if it is an usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed.[3]

§ 497. Presumed from User of Corporate Powers. — While the regular proof of incorporation consists of proof of (1) legislative authorization, and (2) *user* thereunder,[4] — yet there is a rule of evidence which in many cases dispenses with proof of the

[1] *Post*, Ch. 184.

[2] Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; *s. c.* 39 Am. Dec. 344, 353.

[3] Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520; Elizabeth City Academy *v.* Lindsey, 6 Ired. (N. C.) 476; *s. c.* 45 Am. Dec. 500; Wilmington &c. R. Co. *v.* Saunders, 3 Jones L. (N. C.) 128; Atlantic &c. R. Co. *v.* Johnston, 70 N. C. 348.

[4] *Post*, § 499.

former element and holds the latter sufficient. Under this rule the *existence of a charter* will be *presumed* from the long existence of the body in the character of a corporation, and from a long continued user of privileges which belong exclusively to corporations, acquiesced in by the State.[1] The doctrine was thus expressed by Howk, J., in the Supreme Court of Indiana, in speaking of an assumed religious corporation: "For nearly twenty-five years the 'Trustees of the Methodist Protestant Church,' under that corporate name, have assumed to act and have acted as a corporation. After that long lapse of time, no person except the State can be heard to call in question the legal corporate existence of said trustees, or their rights, powers and franchises as said corporation."[2]

§ 498. Especially where Rights have been Acquired Thereunder. — Added force is given to this principle in cases where rights have been acquired on the faith of the assumed corporation being such *de jure*, and where to declare it not possessed of corporate powers would operate to disturb those rights. It is therefore merely another way of reaching the same result, to say, as some of the courts have said, that the legal existence of the corporation will be presumed in such an action, where it has gone into operation as a corporation, and where rights have been acquired on the faith of its being such.[3]

§ 499. Corporations by Presumption or User. — This leads us to a principle of somewhat infrequent application in this country, but of frequent application in England, especially in respect of ancient boroughs and other municipal corporations, — which is, that a corporation may exist by *prescription*, although it cannot exhibit a charter. The principle is similar to that which

[1] Greene *v.* Dennis, 6 Conn. 293; *s. c.* 16 Am. Dec. 58; Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; *s. c.* 39 Am. Dec. 344, 353. Where corporators sign and acknowledge their charter as "citizens of G. County, State of Kansas," and describe themselves in the body of the charter as "all of Salt Springs, G. County, Kansas," it will be presumed that they were citizens of Kansas, and, all else appearing regular, that the corporation was duly incorporated. Sword *v.* Wickersham, 29 Kan. 746.

[2] White *v.* State, 69 Ind. 273, 279.

[3] Hagerstown Turnp. Co. *v.* Creeger, 5 Harr. & J. (Md.) 122; *s. c.* 9 Am. Dec. 495. Compare Greene *v.* Dennis, 6 Conn. 393; *s. c.* 16 Am. Dec. 58; Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; *s. c.* 39 Am. Dec. 344.

creates title to real property, which has been held by a long continued exclusive possession, by the *presumption of a grant.*[1] Stated in other language, where there has been a corporate body, *de facto*, for a considerable period of time, claiming at least to be such, and holding and enjoying property as a corporation, it will be presumed that all merely *formal requisites* to the due creation of a corporation have been complied with.[2] In respect of the *manner* in which the prescriptive right to be a corporation is *pleaded* at common law, we find it ruled in an old case that, in a proceeding by *quo warranto* against persons claiming to exercise corporate franchises, if they set up that they are a corporation by prescription, they must set up that they are a corporation known by such a name *time out of mind;* for a prescription cannot be alleged in several persons unless as a corporation.[3] The *proof*, of course, follows the pleading. Therefore, in a case where it appeared that no record of the organization of a school district could be found, and that the trustees and their predecessors, by the same name and title, had exercised their functions as trustees of the village district during *forty years*, without objection, the due incorporation and organization of the district was presumed.[4] The *effect* of prescriptive proof of the existence of a corporation of a particular kind, is to establish the conclusion that the body possesses all the powers usually given by law to *such* corporations.[5]

§ 500. **What Necessary to give Rise to this Presumption.** — But in order to give rise to this presumption, the acts done must bear the impress of *corporate acts;* they must be such as corporations are competent, and individuals incompetent, to perform.[6] Thus, the fact that the yearly meetings of a community of Quakers kept records, had a clerk and treasurer, received contributions, exercised general supervision over the spiritual concerns of Quakers, celebrated marriages, and admitted and discarded

[1] In a note to an old case it is said that a corporation can have anything by prescription, and also by charter, and that it can use both titles. Blackston *v.* Martin, Latch. 112, 113.

[2] All Saints Church *v.* Lovett, 1 Hall (N. Y.), 191.

[3] Rex *v.* Beardwell, 2 Keb. 52.

[4] Robie *v.* Sedgwick, 35 Barb. (N. Y.) 319.

[5] *Ibid.*

[6] Kirkpatrick *v.* Keota United Presbyterian Church, 63 Iowa, 372.

members,—has been held not sufficient to prove that it was a corporation.[1] And similarly no presumption of incorporation arises from the mere fact that the business was transacted by a president and secretary.[2]

§ 501. Validity of Corporate Existence not Litigated Collaterally. — Another step brings us to a class of cases where we find the sweeping declaration that the rightfulness of an assumed corporation cannot be litigated in a collateral proceeding, but can only be litigated in a direct proceeding instituted by the State for that purpose; [3] as, for instance, in an action by a corporation on a transferable contract in which it claims as the equitable assignee; [4] or in a suit in equity to enjoin it from constructing its works, or by way of defense to its proceedings to acquire land; [5] or on a bill filed by stockholders for mismanagement.[6] On this principle, a *stranger* to contracts made with stockholders of a company which has not completed its organization as a corporation, but who have assumed to act as a corporation, cannot object to the validity of the contracts because the corporation is not organized; [7] and for equally strong reasons, a *party* to such a contract cannot.[8]

[1] Greene *v.* Dennis, 6 Conn. 293; *s. c.* 16 Am. Dec. 58.

[2] Clark *v.* Jones, 87 Ala. 474. *s. c.* 6 South. Rep. 362.

[3] Toledo &c. R. Co. *v.* Johnson, 49 Mich. 148; Rondell *v.* Fay, 32 Cal. 354; Jersey City Gaslight Co. *v.* Consumers' Gas Co., 40 N. J. Eq. 427; Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548; German Ins. Co. *v.* Strahl, 13 Phila. (Pa.) 512; Chicago &c. R. Co. *v.* Stafford County Comm'rs, 36 Kan. 121; Keene *v.* Van Reuth, 48 Md. 184; Town of Searcy *v.* Yarnell, 1 S. W. Rep. 319; *s. c.* 47 Ark. 269; Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; *s. c.* 39 Am. Dec. 344, 353. See to the same effect Centre &c. Turnpike Co. *v.* McConaby, 16 Serg. & R. (Pa.) 145; State *v.* Carr, 5 N. H. 371; Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520; Grays *v.* Turnpike Co., 4 Rand. (Va.) 578; Bear Camp River Co. *v.* Woodman, 2 Me. 404; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 371; Trustees *v.* Hills, 6 Cow. (N. Y.) 23; *s. c.* 16 Am. Dec. 429; Lehigh Bridge Co. *v.* Lehigh Coal Co., 4 Rawle (Pa.), 9; *s. c.* 26 Am. Dec. 11; Chester Glass Co. *v.* Dewey. 16 Mass. 94; *s. c.* 8 Am. Dec. 128; John *v.* Farmers' Bank, 2 Blackf. (Ind.) 367; *s. c.* 20 Am. Dec. 119; Day *v.* Stetson, 8 Me. 372.

[4] Toledo &c. R. Co. *v.* Johnson, 55 Mich. 456.

[5] Aurora &c. R. Co. *v.* Lawrenceburgh, 56 Ind. 80; Aurora &c. R. Co. *v.* Miller, 56 Ind. 88.

[6] Merchants' & Planters Line *v.* Waganer, 71 Ala. 581.

[7] New Haven Wire Co. Cases, 57 Conn. 352; *s. c.* 5 Law. Rep. Ann. 300; 16 Atl. Rep. 393.

[8] *Post*, § 518.

§ **502. Limitations of this Doctrine.** — But it is apprehended that the rule does not exist in any American jurisdiction in the naked and unqualified form which the above language would imply, except in cases where the party questioning the existence of the corporation has, by its conduct, *estopped* himself from making the issue. We must not get too far away from the primal proposition that the legislature alone can create a corporation,[1] and that a collection of individuals cannot make themselves a corporation by merely resolving to be such or calling themselves such. The three tailors of Tooley Street did not make themselves the people of England by passing a resolution in which they styled themselves such. There must be some basis for the operation of the rule, and accordingly we find a better statement of it in the proposition that, where a corporation *exists de facto*, and in fact exercises corporate powers, the question whether it exercises such powers lawfully cannot be litigated in a collateral proceeding between private parties or between a private party and the corporation; the question can only be litigated between the corporation and the State.[2] The term "collateral proceeding," in the statement of this principle, is used to designate cases where the question of the existence of the corporation is incidental or collateral to the main object of the suit;[3] and the oft-repeated reason of the rule is the inconvenience of trying the question of the right of an assumed corporation to exist, where the question arises as a mere incident to a private litigation, and where *the State*, which is chiefly interested in the question, is willing that it should exist. "It would," said Brickell, C. J., "produce only disorder and confusion, embarrass and endanger the rights and interests of all dealing with the association, if the legality of its existence could be drawn in

[1] *Ante*, § 35.

[2] The following cases are to this general effect: Smith *v.* Sheeley, 12 Wall. (U. S.) 358; Clark *v.* Middleton, 19 Mo. 53; Gold Mining Co. *v.* National Bank, 96 U. S. 640; National Bank *v.* Matthews, 98 *Id.* 621; National Bank *v.* Whitney, 103 *Id.* 99; Reynolds *v.* Bank, 112 *Id.* 405; Fortier *v.* Bank, 112 *Id.* 439; Thorington *v.* Gould, 59 Ala. 461; Lehman *v* Warner, 61 Ala. 455; *s. c.* 6 Am. Corp. Cas. 155; Chubb *v.* Upton, 95 U. S. 665; *s. c.* 6 Am. Corp. Cas. 23; Eaton *v.* Aspinwall, 19 N. Y. 119; Upton *v.* Hansborough, 3 Biss. (U. S.) 417; Central Ag. &c. Asso. *v.* Alabama &c. Co., 70 Ala. 120, 133; *s. c.* 9 Am. Corp. Cas. 8, 13; Cochran *v.* Arnold, 58 Pa. St. 399; Pattison *v.* Albany &c. Assn., 63 Ga. 393; North *v.* State, 107 Ind. 356.

[3] State *v.* Butler, 15 Lea (Tenn.), 104.

question in every suit to which it was a party, or in which rights were involved springing out of its corporate existence. No judgment could be rendered which would settle the question finally. But when the government intervenes by an appropriate proceeding, the judgment is final and conclusive, putting an end to controversy."[1]

§ **503. What is Meant by Existing De Facto.** — It is frequently said that in controversies between citizens generally and a corporation, the existence of the latter, when put in issue, is established by showing a corporation *de facto*.[2] By this it is not to be understood that evidence of *user* alone will be *conclusive* of the question of corporate existence. Otherwise, as just suggested, corporations might spring into existence without any warrant of law. "The least proof which has been held sufficient," said Savage, C. J., "is the production of an exemplification of the act incorporating the plaintiffs, and evidence of user under their charter."[3] It has been said by an eminent writer, in explanation of this principle, that if it appear to be acting under color of law, and is recognized by the State as such, such a question should be raised by the State itself, by *quo warranto* or other direct proceeding. And the rule would not be different if the *constitution* itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such under legislative sanction would be sufficient evidence of right, except as against the State; and private parties could not enter upon any question of irregularity.[4] This doctrine has met with frequent judicial approval.[5]

§ **504. Rule Under California Civil Code.** — The Civil Code of California declares that "the due incorporation of any company,

[1] Central &c. Asso. *v.* Alabama &c. Co., 70 Ala. 120, 133; *s. c.* 9 Am. Corp. Cas. 8, 13.

[2] McAuley *v.* Chicago &c. R. Co., 83 Ill. 348; Reisner *v.* Strong, 24 Kan. 410; Wilcox *v.* Toledo &c. R. Co., 43 Mich. 584; Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389.

[3] United States Bank *v.* Stearns, 15 Wend. (N. Y.) 314. See also Methodist Epis. Church *v.* Pickett, 19 N. Y. 482; Searsburgh Turnp. Co. *v.* Cutler, 6 Vt. 315, 323; Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275, 279.

[4] Cooley Const. Lim. 254.

[5] St. Louis *v.* Shields, 62 Mo. 247, 252. The rule applies to religious societies as well as to others. Trustees *v.* Hills, 6 Cow. (N. Y.) 23; *s. c.* 16 Am. Dec. 429.

claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally, in any private suit to which such *de facto* corporation may be a party."[1] This statute has been the subject of frequent interpretations.[2] It has been held that it does not go to the extent of precluding a private person from denying the existence, *de jure* or *de facto*, of an alleged corporation. The mere allegation that a party is a corporation cannot put the question whether it is such a corporation, beyond the reach of inquiry in a suit with private persons. It has been further reasoned that the allegation that the plaintiffs are a corporation is an indispensible allegation in any action brought by them; and necessarily the adverse party may deny it. The statute does not contemplate that the mere allegation that the company has been duly organized should put that fact beyond dispute: but only that when the evidence establishes that the company claims in good faith to be a corporation, and is actually doing business as such, then its due incorporation shall not be inquired into collaterally, Irregularities or defects in the mode of performing the acts prescribed by law as constituting a corporation, cannot be set up by a private individual. But he may show that those acts have not been performed at all. Hence upon an application for a *mandamus* to compel county authorities to complete their subscription to the stock of plaintiff's railroad company, the defendants may deny the plaintiff's incorporation; and may deny that they have complied with the provisions of the law prescribing their organization, or are doing business as a railroad company.[3] And where, in an action by persons suing in a corporate name, against an individual, there is no ground to doubt that the plaintiffs claim in good faith to be a corporation, and are doing business as such corporation, neither the validity of the incorporation, nor the right to exercise corporate powers can be questioned by the defendant.[4] More definitely speaking, where it appears that the plaintiff was recognized in the community as a corporation, and its records show that it was acting as such, that in all its dealings it was so styled, and that it had held corporate meetings, and pursued corporate forms of action, sufficient is shown to bring it within the statute.[5]

[1] Cal. Civ. Code, § 358. This section seems to be the same as the California statute of 1862, p. 110, § 6. The act of 1862 was not limited to corporations existing at the time of its passage, but extended to corporations afterwards created. Pacific Bank *v.* De Ro, 37 Cal. 538.

[2] Bakersfield Town Hall Assoc. *v.* Chester, 55 Cal. 98.

[3] Oroville &c. R. Co. *v.* Plumas County, 37 Cal. 354.

[4] *Ibid.*

[5] Lakeside Ditch Co. *v.* Crane, 80 Cal. 181; *s. c.* 22 Pac. Rep. 76.

§ 505. Rule Applies only where the Corporation Might Exist. — A limitation of the doctrine is that the rule under discussion extends only to those cases where there is a law under which the corporation *might* exist. If there is *no law* under which it might exist, its non-existence may be set up even in a collateral proceeding;[1] and the rule is the same where there is only an *unconstitutional law*.[2] "To be a corporation *de facto*, it must be *possible* to be a corporation *de jure*, and acts done in the former case must be legally authorized to be done in the latter, or they are not protected or sanctioned by the law. Such acts must have an *apparent right*."[3] It is an easy step from this view to the general rule that, to establish the existence of a *de facto* corporation, a *charter* or *law* authorizing the existence of the corporation must be shown, and *user* under such authority.[4]

§ 506. Effect of this Doctrine upon the Rights of Shareholders and Creditors. — An application of this principle is moreover found[5] in a class of cases relating to the banking associations organized under an unconstitutional law in Michigan. They were not *de facto* corporations in such a sense as enabled their receivers to maintain actions to collect debts due to them,[6] or to foreclose mortgages given to secure such debts.[7] Nor

[1] Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275, 278; Krutz *v.* Paola Town Co., 20 Kan. 397; Eaton *v.* Walker, 76 Mich. 579; *s. c.* 6 Law. Rep. Ann. 102; 43 N. W. Rep. 638.

[2] Eaton *v.* Walker, *supra;* Green *v.* Graves, 1 Doug. (Mich.) 351; Hurlbut *v.* Britain, 2 Doug. (Mich.) 191; State *v.* How, 1 Mich. 512; Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275, 278; Harriman *v.* Southam, 16 Ind. 192; Brown *v.* Killian, 11 Ind. 449; Snyder *v.* Studebaker, 19 Ind. 462 (overruling on this point Evansville &c. R. Co., *v.* Evansville, 15 Ind. 395).

[3] Everson *v.* Ellingson, 67 Wis. 634, opinion by Orton, J. To establish the existence of a corporation *de facto*, the mere acting as a corporation, for any length of time, is not sufficient. A charter, or law which of itself creates, upon its acceptance, a corporation, is necessary; or, if the law provides that a corporation may be formed upon a subsequent compliance with prescribed regulations and forms, *some* of those regulations and forms must have been observed, although *others* have been omitted. DeWitt *v.* Hastings, 40 N. Y. Superior Ct. 463.

[4] Abbott *v.* Omaha Smelting Co., 4 Neb. 416; Miami Powder Co. *v.* Hotchkiss, 17 Ill. App. 622; *post*, Ch. 184. It has been held that *nul tiel corporation* may be pleaded in an action by a corporation where the incorporating act does not *unconditionally* create the corporation. Mahony *v.* Bank, 4 Ark. 620.

[5] Compare *post*, Ch. 156.

[6] Green *v.* Graves, 1 Doug. (Mich.) 351.

[7] Hurlbut *v.* Britain, 2 Doug. (Mich.) 191.

could *shareholders* in a banking corporation organized under an unconstitutional banking law, be made liable as *partners* upon the obligations of the pretended bank.[1] But these decisions stumble upon technical difficulties. The judges who rendered them were unable to find a way by which an obligation which ought in good conscience to be enforced, could be enforced when there was technically no payee or obligee. Neither could they understand how a body of co-adventurers who had organized themselves as a banking corporation under an unconstitutional law could be made liable for the obligations of the pretended bank, when the very issue of such obligations was forbidden by law. They therefore allowed the adventures to escape liability upon their obligations, and allowed the losses to fall upon the innocent public, — a shameful instance of the sacrifice of justice to mere theories. In a subsequent case, reviewing these decisions, it was suggested by Mr. Justice Cooley, that if the business "had not been illegal, possibly it might have been held that those who assumed to carry on banking business in the name of an association not empowered to do so, were personally responsible as joint promisors to those who had trusted them."[2] The court, in the last cited case, further concluded that, while a corporation organized under a void law cannot enforce obligations made to it, yet if not organized for unlawful purposes, a *receiver* of its assets can demand in equity an accounting for the debt purported to be secured by a mortgage made to it.[3] It is a strik-

[1] State *v.* How, 1 Mich. 512.

[2] Burton *v.* Schildbach, 45 Mich. 504, 511; citing Medill *v.* Collier, 16 Oh. St. 599.

[3] *Ibid.* The court, in struggling with this question, said, in its opinion by Cooley, J.: "When persons in good faith proceed to organize what they intend shall be a corporation, contemplating a lawful business, and the organization proves ineffectual, but the money jointly contributed by the members associated finds its way into the hands of one of their number, or of some third person, it ought not to be in the power of such person to retain what he has thus received, and to refuse to account to those who were equitably entitled. There is an injustice in such conduct which equity ought to be able to correct. If the money has been obtained in good faith, in the mistaken belief that a corporation existed, it ought not to be retained when the mistake is discovered, and the corporators, who cannot sue at law, ought to be at liberty to come into equity for an accounting. We know of no principle of equity that would be violated by giving such redress; and, on the other hand, there is ground for the argument that it would be entirely competent for the legislature retrospectively to affirm

ing illustration of the backward state of the law that we still find eminent and enlightened judges struggling with such difficulties. The simple and true view is, that if men undertake to form themselves into a business company which the State cannot recognize as a corporation, or which is even forbidden by the State, and in that character contract debts which would be valid and enforcible if contracted by individuals, the courts of justice should hold them liable as *partners*.[1] It is intolerable that A. B. & C., by merely assuming a corporate name and pretending to be a corporation, can incur with innocent members of the public obligations which would be valid if incurred by them individually, and then escape liability because the law forbids them to act as a corporation in the incurring of such obligations. A simple rule, and one which should apply to all cases is that, where the obligations of a pretended corporation are neither inequitable nor immoral, the judicial courts should enforce them against the corporations as partners.[2] So to do would be strictly consonant with public policy, because if business adventurers learn that, unless their corporate organization is lawful and valid they are liable as partners, this will deter them from attempting to form illegal or prohibited corporations. The Supreme Court of Michigan, abandoning its early conceptions, has recently held that, whilst a law of that State which provides for the organization of corporations, is *void*, on account of its title not being within the constitutional provision; whilst an association under its provisions, each member sharing in the profits and losses of the business in proportion to the money he has put into the capital stock, will not constitute the parties thereto a corporation *de facto;* and whilst their carrying on business in the corporate name is not evidence of *user* which can be considered in aid of their legal existence, — yet they are *liable as partners* for debts contracted by them.[3]

and validate the promise to repay, so that a suit at law in the name of the association might be brought upon it." *Ibid.;* citing Lewis *v.* McElvain, 16 Oh. 347; Savings Bank *v.* Allen, 28 Conn. 97; Parmelee *v.* Lawrence, 48 Ill. 331; Town of Danville *v.* Pace, 25 Gratt. (Va.) 1; Thompson *v.* Morgan, 6 Minn. 292.

[1] *Ante*, § 416.

[2] As was done in Hill *v.* Beach, 12 N. J. Eq. 31. See also *ante*, § 417, *et seq.*

[3] Eaton *v.* Walker, 76 Mich. 579; 43 N. W. Rep. 638.

§ 507. Validates Irregularities in Organization.— An application of this principle, and one with which we have most concern in this place, is that it operates to validate *irregularities* in the *organization* of corporations. Applying this principle, it has been ruled that the *regularity of the organization* of a corporation can be questioned only in a direct proceeding taken by the State, as by *quo warranto*, and that no private person will be allowed to impeach collaterally the validity of its organization.[1] This principle has the freest application where certain adventurers have assumed to organize a corporation under a law under which they *might* have organized it, and where they have been for a greater or less length of time in the *user* and enjoyment of the corporate privileges which they have assumed, but where there has nevertheless been some *defect* or *irregularity* in the mode of their corporate organization,[2] — such, for instance, as the failure to record a duplicate of the certificate of incorporation in the county where the operations of the company are carried on.[3] In short, it seems clear from an examination of the authorities, that a *bona fide* attempt to organize and a *substantial compliance* with the provisions of the law, are all that is necessary to establish, as between the corporation and persons other than the State under which it claims to be incorporated, its capacity to sue and to be sued, and to perform other acts as a corporation.[4]

[1] East Norway &c. Lutheran Church *v.* Froislie, 37 Minn. 447; 35 N. W. Rep. 260; Baker *v.* Backus, 32 Ill. 79; Tarbell *v.* Page, 24 Ill. 46; Ossipee Man. Co. *v.* Canney, 54 N. H. 295; Lord *v.* Essex Bldg. Asso., 37 Md. 320. See also Childs *v.* Smith, 46 N. Y. 34.

[2] Thompson *v.* Candor, 60 Ill. 244; Cincinnati &c. R. Co. *v.* Danville &c. R. Co., 75 Ill. 113; De Witt *v.* Hastings, 40 N. Y. Super. 463 (irregularity of filing certificate of incorporation); Tarbell *v.* Page, 24 Ill. 46; Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389; Baker *v.* Backus, 32 Ill. 79; Rondell *v.* Fay, 32 Cal. 354; Buffalo &c. R. Co. *v.* Carey, 26 N. Y. 75.

[3] Humphreys *v.* Mooney, 5 Col. 282. Although articles of incorporation were not adopted until after the stock was subscribed and business begun, they are binding upon the parties and fix their rights as among themselves, at least from the time of their adoption; and although the articles were not recorded as required by statute, yet where all the other steps necessary to create a corporation were taken, the parties are stockholders of a corporation, as among themselves. Heald *v.* Owen, 79 Iowa, 23.

[4] Methodist Episcopal Church *v.* Pickett, 19 N. Y. 482; Mokelumne &c. Co. *v.* Woodbury, 14 Cal. 424; Marsh *v.* Astoria Lodge, 27 Ill. 421; Spring Valley Water Works *v.* San Francisco,

§ 508. Except where the Thing to be Done is a Condition Precedent. — An exception to the operation of the rule in this particular is, that where the thing to be done is made by the statute a *condition precedent* to the organization of the corporation, then there is no corporation unless this condition is substantially performed.[1] There is also considerable authority, some of it discredited by time, to the effect that, where the body does not become entitled to corporate powers, until certain acts have been performed, such acts must be shown to have been done to establish the existence of the corporation, even in a collateral proceeding.[2] The effect of this doctrine is that, if the charter requires the performance of certain acts as conditions precedent to the existence of a corporation, mere general evidence of *user* cannot be regarded as conclusive that such conditions have been performed.[3] In pursuing this inquiry, courts usually hold that it is unnecessary to prove that the body have complied with certain statutory requisitions, which are not in terms, or by necessary or reasonable implication, conditions precedent to their existence or capacity to do particular acts.[4] The decided cases afford no satisfactory test of what may be considered as conditions precedent to the corporate existence, the performance of which must be shown. Certain it is that many irregularities and omissions which might affect the right of the corporation to exist when called in question by the State, in a direct proceeding, do not impair its capacity to sue and be sued in general. "So long as the State does not interfere," said Bronson, C. J., in one

22 Cal. 434; Baker *v.* Neff, 73 Ind. 68; *ante*, § 224.

[1] *Ante*, § 226; Lord *v.* Essex Building Asso., 37 Md. 320; Boyce *v.* Trustees, 46 Md. 359.

[2] Fire Department *v.* Kip, 10 Wend. (N. Y.) 266; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.), 296; Utica Ins. Co. *v.* Tillman, 1 Wend. (N. Y.) 555; United States Bank *v.* Stearns, 15 Wend. (N. Y.), 314; Lucas *v.* Bank, 2 Stew. (Ala.) 147; Wood *v.* Jefferson Co. Bank, 9 Cow. (N. Y.) 194; Southbold *v.* Horton, 6 Hill (N. Y.), 501; Bank of Auburn *v.* Aikin, 18 Johns. (N. Y.) 137; Mokelumne &c. Co. *v.* Woodbury, 14 Cal. 424.

[3] Long continued *user*, however, has great weight in support of the presumption that the conditions upon which the charter was granted have been duly performed. All Saints Church *v* Lovett, 1 Hall (N. Y.), 191; Dunning *v.* New Albany &c. R. Co., 2 Ind. 437.

[4] Narragansett Bank *v.* Atlantic Silk Co., 3 Metc. (Mass.) 282; Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64, 81; Bank *v.* Allen, 11 Vt. 302; Eaton *v.* Aspinwall, 19 N. Y. 119.

case, "the company may sue, or do any other lawful act, whatever sins may have been committed in bringing the body into existence." [1]

§ **509. Further Observations and Illustrations.** — Where a company, having taken all other steps to become incorporated under the general law, omits to file the certificate of incorporation in the office of the Secretary of State, such a non-compliance with the statute might sustain a *quo warranto* or *scire facias* on behalf of the people, and oust the corporators from the exercise of their franchise; but it does not necessarily follow that it is not, as to third persons, a corporation.[2] So, it has been reasoned that a defect in the organization of a corporation, which would not avail a defendant in an action by the corporation, upon the plea of *nul tiel corporation*, cannot be shown either by the corporation itself when a defendant, or by a stockholder when sued for debts of the corporation.[3] - - - - Similarly, in one case, where the affidavit annexed to the articles of association filed under a general corporation law, did not contain the allegation "that it is intended in good faith to construct or maintain and operate the road mentioned in the articles of association," — the judge delivering the opinion of the court said: "I am of the opinion that, under this and similar general acts for the formation of corporations, if the *papers filed*, by which the corporation is sought to be created, are *colorable*, but so defective that in a proceeding on the part of the State against it, it would for that reason be dissolved, yet by acts of user under such an organization it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally by any person." [4] - - - - Where a company was incorporated for the purpose of removing from a

[1] McFarlan *v.* Trenton Ins. Co., 4 Den. (N. Y.) 392, 397; Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389. That there are irreconcilable variations in the views of the courts as to what are conditions precedent and what are conditions directory, has been already shown. *Ante*, § 226. Thus, the provisions of the Illinois act of 1859, relating to corporations, that "any company formed under this act shall file a copy of their by-laws, signed by the president and secretary of such company, and a list of the stockholders therein, and the amount of the stock signed, as aforesaid, in the county clerk's office," etc., is but directory, and is not a requisite to incorporation. Upon compliance with section 1 of the act, the incorporation became complete. Rose Hill &c. Co. *v.* People, 115 Ill. 133. While, as elsewhere seen (*ante*, § 227), the decisions of other courts would make this a condition precedent.

[2] Baker *v.* Backus, 32 Ill. 79; *ante*, § 240.

[3] Eaton *v.* Aspinwall, 19 N. Y. 119, 122.

[4] Buffalo &c. R. Co. *v.* Cary, 26 N. Y. 75. But see the dissenting opinion of Allen, J., in this case.

river all obstructions to the free passage of logs, etc., and were authorized to demand *toll* from the owners of logs, etc., freely passing down the river, it was held, in an action to recover tolls for logs that passed the river freely, that the defendant could not show that the corporation had not removed the obstructions, though the act of incorporation was by its terms to be void if they would not be removed in one year, and though more than a year had elapsed before the action was brought.[1] - - - - In an action upon a *bond* issued by a *school board*, if it appear that such a school board had a *de facto* existence, acted in that official capacity, was recognized as such by the county court, it cannot be set up as a defense to avoid liability on the bond, that it had no legal existence. "Such a board must be regarded as one *de facto* whose right to act no one but the State is competent to question."[2] - - - - Where a corporation instituted a suit to establish a certain paper writing as the last *will and testament* of a deceased person, which paper contained a *bequest* to a legatee having the name of the plaintiff, to wit, "the Catholic Church at the city of Lexington," the principle was applied that, whether a corporation exists *de jure* or not, its existence cannot be questioned in a collateral proceeding, if it appear to be acting under color of law, and recognized by the State as such. "The question of its being must be raised by the State itself, on a *quo warranto* or other direct proceeding; and this, although the act incorporating it, or authorizing its incorporation, is violative of the constitution of the State."[3] - - - - In replevin by one claiming the property under a chattel mortgage executed by a *de facto* corporation, defendant offered evidence to show the non-existence of the corporation *de jure* by reason of the articles of incorporation being acknowledged. The articles were otherwise regular, and showed an attempt in good faith to comply with the statute, and there had been open and public exercise of corporate powers by the company for several months prior to the date of the mortgage. It was held that this was sufficient to authorize plaintiff to deal with the company as a corporation *de facto*, and to warrant the refusal of the court to allow defendant to attack its existence collaterally by introducing the evidence offered.[4]

§ 510. State Precluded by Lapse of Time from Questioning Regularity of Corporate Organization.— Although, as a general

[1] Bear Camp River Co. *v.* Woodman, 2 Me. 404.

[2] Franklin Avenue &c. Inst. *v.* Board of Education, 75 Mo. 408.

[3] Cath. Church *v.* Tobbein, 82 Mo. 418, 424.

[4] Duggan *v.* Colorado Mortgage &c. Co., 11 Col. 113; 20 Am. & Eng. Corp. Cas. 519; 17 Pac. Rep. 105.

rule, the statute of limitations does not run against the State, nor can laches be imputed to it,— yet this rule will not be allowed to apply so as to destroy the existence of a corporation, where many private rights have been acquired on the faith of it, and where the vacation of its franchises would lead to confusion and injustice. It was so held where it was sought by an information in the nature of *quo warranto*, to vacate the franchises of a railroad company, on the ground that its articles of association were defective in not specifying its *terminus* with sufficient certainty. As between eight and nine years had elapsed since the filing of the articles in the office of the Secretary of State, and as such filing was notice to the State, at the time, of the manner in which the organization of the corporation had taken place, a judgment of ouster was refused.[1]

§ **511. Corporation Suing for Rights which can only Inhere in it as a Corporation.**— It is believed, however, that the exception to the general rule obtains where the corporation is the actor in the litigation and is therein seeking to enforce a right which inheres in it as a corporation. Thus, if a corporation has been created to erect a bridge, with power to *take tolls* thereon for the period of twenty years, and after the lapse of twenty years it sues to recover such tolls, the defendant may show that the twenty years have expired and thereby defeat the action.[2] It is also assumed that where a corporation proceeds to *condemn the lands* of a private owner for public uses, it must show a *prima facie* right to exercise this extraordinary power, by proving that it has corporate existence, at least *de facto*. An administrator cannot maintain an action in his representative character without pleading and proving that he is an administrator, because it is only in that character that he has a *title* to sue. He ordinarily proves this by putting in evidence his letters of administration. It should seem, upon the same principle, that where a plaintiff, claiming to be a corporation, brings an action which, from its very nature, it cannot have unless it is a body corporate, it must prove

[1] State *v.* Bailey, 19 Ind. 452. As to the period of *limitation* for an information in the nature of *quo warranto*, see Ang. & A. Corp., § 743.

[2] Grand Rapids Bridge Co. *v.* Prange, 35 Mich. 400; *s. c.* 24 Am. Rep. 585.

its corporate existence, at least by putting in evidence its certificate of incorporation.[1]

§ 512. **Corporations by Legislative Recognition.** — A doctrine frequently admitted[2] by American courts, is that, where a body of persons act as a corporation, and the legislature passes an act which distinctly recognizes their corporate character, they may be deemed to be rightfully a corporation in consequence of such legislative recognition. It has been frequently ruled that defects in the organization of corporations, which have been organized under a general law, may be cured by subsequent legislative recognition of the corporation.[3] The rule is that, although the organization of a corporation may be irregular, in such a sense that it could be overthrown in a direct proceeding by the State, yet where its corporate existence has been recognized by the legislature, this will make it a good corporation, for the purposes of collateral proceedings.[4] In like manner, the fact that

[1] Thus, the owners of land whom it is proposed to assess for the benefit of a work undertaken by a gravel road company, if they are not shareholders and have not contracted with the company as a corporation, are not estopped in a suit to enjoin the collection of the assessment, from denying the corporate existence of the company. Piper *v.* Rhodes, 30 Ind. 309. A railroad corporation claiming the right to occupy with its tracks the streets of a town or city must be a corporation *de jure* and not merely a corporation *de facto*. New York Cable Co. *v.* New York. 104 N. Y. 43. So of a corporation seeking to condemn land for its uses. Atlantic &c. R. Co. *v.* Sullivant, 5 Oh. St. 276; Atkinson *v.* Marietta &c. R. Co., 15 Oh. St. 21; *post*, Ch. 184.

[2] It has been said that corporate powers cannot be created by implication, nor extended by construction. Pennsylvania R. Co. *v.* Canal Commissioners, 21 Pa. St. 9. In an earlier case we find the conclusion that individuals acting together for the benefit of a society are not to be considered as a corporation, unless they expressly show their corporate capacity. Ernst *v.* Bartle, 1 Johns. Cas. (N. Y.) 319. But this was before the doctrine had become established that the corporation may, as to third persons, exist *de facto;* that a body of persons holding themselves out as a corporation are thereby estopped, as against third persons, to deny their corporate character; and that persons entering into contracts with supposed corporations are thereby estopped in actions to enforce a contract to deny their corporate existence.

[3] Basshor *v.* Dressel, 34 Md. 503; People *v.* Perrin, 56 Cal. 345; Atlantic &c. R. Co. *v.* St. Louis, 66 Mo. 228.

[4] Atlantic &c. R. Co. *v.* St. Louis, *supra;* Black River &c. R. Co. *v.* Barnard, 31 Barb. (N. Y.) 258. The theory of the last case is that, where the organization of a railway company is regular on its face, and the company, while in the exercise of corporate functions, is recognized as a corporation by the legislature, it becomes, by that recognition, a legal corporation,

two railway companies have become blended by a *consolidation*, may, it has been held, be shown by a legislative recognition in the form of a private statute.[1] But there is much force in the opposing conclusion that, where the *constitution* of the State forbids corporations to be created except by *general laws*, the mere recognition of a body as an existing corporation, in acts of the legislature, cannot operate to give the organization validity, for this would be tantamount to creating it by a special law.[2] But if the language of the statute, from which it is sought to infer a legislative recognition of the particular body as a corporation, is equally consistent with the conclusion that the legislature did not intend to recognize it as possessing such a character, it will not be deemed such under the operation of this principle. It has been reasoned that, while express words of incorporation are not essential to create a corporation, general language in a statute being sufficient, if a corporation is necessary to accomplish the purpose contemplated, yet, if the necessity for a corporation does not exist, it will not be deemed created by implication.[3] On a similar principle, where a cor-

and that, if any defect exist in its organization it is thereby waived by the State and cured. In that particular case the articles of association were in the proper form, and properly authenticated, and the company had built part of its road and had been doing business five years, and the legislature had, by three acts, distinctly recognized its corporate existence. It was held, in an action upon stock assessments against one who had acted as director, that the plaintiff was to be deemed a legal corporation and as such authorized to sue. In like manner it has been held that the requirement for the formation of a private corporation that an application be filed with the Secretary of State and acknowledged before a proper officer, may be waived by the State, by a subsequent statute recognizing the existence of a corporation organized without compliance with said requirement. Central Agricultural &c. Asso. *v.* Alabama Gold Life Ins. Co., 70 Ala. 120.

[1] McAuley *v.* Columbus &c. R. Co., 83 Ill. 348; *ante*, § 318.

[2] Oroville &c. R. Co. *v.* Supervisors, 37 Cal. 354; *post*, § 590. As to the *constitutionality* of an act of the legislature relieving the creditors of a particular company, see Potts *v.* Deleware Water Power Co., 9 N. J. Eq. 592; Corrigan *v.* Trenton Delaware Falls Co., 7 N. J. Eq. 489.

[3] Walsh *v.* New York & Brooklyn Bridge, 96 N. Y. 427. In this case it was held that, as the purpose of N. Y. Acts 1875, ch. 300, in relation to the New York and Brooklyn bridge, was to extinguish the then existing corporation, and vest all its property in the two cities, and as all the purposes of the act could be carried out without the creation of a corporation, the board of trustees, for whose appointment the act provided, were not to be deemed a corporation, but merely

poration *has done acts* in excess of its powers, for which the State might proceed to forfeit its franchises, it is a sound conclusion that, as the legislature might have clothed the corporation with such power, so it may ratify and confirm the illegal acts, unless there is something in the constitution of the State restraining this kind of legislative action.[1] The *original statute*, whether a special charter or a general law, and the subsequent *curative act* will, in so far as they are consistent with each other, unite to form the charter of the company, and the acceptance of the new act will not have the effect of destroying, but merely that of modifying the former corporate organization.[2]

§ **513. Illustrations.** — A special act of the legislature *changing the name* of a corporation,[3] or recognizing it by name and extending and continuing its corporate rights and privileges,[4] has been held to validate its existence for the purposes of a collateral proceeding. - - - - In a suit between a railroad and a municipal corporation, contesting the right of the railroad company to operate its track upon one of the streets of the city, there was no proof of the corporate existence of the railroad company through which the plaintiff company claimed to derive its franchises. But it appeared that the State, through its legislature, had sold a railroad to certain individuals, and required them to form themselves into a corporation for the purpose of owning and operating it, and that the legislature had, on several subsequent occasions, recognized the existence of these vendees as a corporation. It was held that the existence of such a corporation could not be

agents for and representatives of the two cities. See *ante*, § 39. As to the revival of a dissolved corporation by a subsequent *decree* distinctly recognizing its existence, see Lea *v.* American &c. Canal Co., 3 Abb. Pr. (N. S.) (N. Y.) 1.

[1] Shaw *v.* Norfolk Railroad &c. Co., 5 Gray (Mass.), 162, 179; Richards *v.* Merrimac &c. R. Co., 44 N. H. 127, 136.

[2] Johnston *v.* Crawley, 25 Ga. 316. The rule which validates *de facto* corporations by legislative recognition and public acquiescence in their long continued existence, applies more properly to *municipal* than to private corporations. "Municipal corporations," it has been said, "are created for the public good — are demanded by the wants of the community; and the law, after long continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence." Jameson *v.* People, 16 Ill. 257, 259. See also United States Bank *v.* Dandridge, 12 Wheat. (U. S.) 64; Dunning *v.* New Albany &c. R. Co., 2 Ind. 437; Society of Middlesex *v.* Davis, 3 Metc. (Mass.) 133; People *v.* Farnham, 35 Ill. 562.

[3] White *v.* Ross, 4 Abb. App. Dec. (N. Y.) 589.

[4] Kanawha Coal Co. *v.* Kanawha &c. Coal Co., 7 Blatchf., (U. S.) 391.

questioned by third persons, and that such recognition dispensed with other evidence of the fact.[1] - - - - In *quo warranto* against the trustees of a town challenging its corporate existence, it appeared that, by certain public statutes the legislature had authorized the president and trustees of the town, as a corporation, to subscribe stock in a certain railway company, and also in a certain plank road company, upon conditions named in the acts; to issue and negotiate bonds of the corporation; to provide for paying interest on such bonds, and to levy and collect taxes upon property within the corporation. "These acts," said Skinner, J., "recognizing the existence of the corporation, and empowering it to act as a body corporate, in issuing and negotiating obligations of the town, and upon the faith of which, individuals may have invested their money, — preclude inquiry into the question of the original legal organization of the town, and are conclusive upon the question of the existence of the corporation. If there is no such corporation, all acts done under the supposed corporate powers are mere nullities; and no liabilities can exist by reason of contracts made in the corporate name, except, perhaps, against individuals who never contemplated themselves incurring personal liabilities, by acts performed in an official capacity. Were we to hold, after this acquiescence of the public, and these recognitions of the legislature, that the town remains unincorporated, on account of some defect in its original organization as a corporation, what confidence could individuals have in the validity of securities emanating from these local authorities?" [2]

Article II. Corporations by Estoppel.

[1] Atlantic &c. R. Co. *v.* St. Louis, 66 Mo. 228.

[2] Jameson *v.* People, 16 Ill. 257.

§ 518. **Obligor in Contract with Corporation Estopped to Deny Corporate Existence.** — A party who enters into a written contract with a body purporting to be a corporation, in which it is described by its corporate name, solemnly admits the existence of the corporation for the purposes of a suit brought to enforce the obligation, and in such an action he will not be permitted to plead *nul tiel corporation*, or otherwise to deny the corporate existence of the plaintiff.[1]

[1] State *v.* Carr, 5 N. H. 367; President &c. *v.* Thompson, 20 Ill. 200; Hamilton *v.* Carthage, 24 Ill. 22; Kayser *v.* Bremer, 16 Mo. 88; St. Louis *v.* Shields, 62 Mo. 247, 251; National Ins. Co. *v.* Bowman, 60 Mo. 252; Farmers &c. Ins. Co. *v.* Needles, 52 Mo. 17; Ohio &c. R. Co. *v.* McPherson, 35 Mo. 13, 26; *s. c.* 86 Am. Dec. 128; Hubbard *v.* Chappel, 14 Ind. 601; Studebaker Man. Co. *v.* Montgomery, 74 Mo. 101; Real Estate Savings Institution *v.* Fisher, 9 Mo. App. 593; Jones *v.* Kokomo Building Association, 77 Ind. 340; Platte Valley Bank *v.* Harding, 1 Neb. 461; Fresno Canal &c. Co. *v.* Warner, 72 Cal. 379; *s. c.* 14 Pac. Rep. 37; 2 Rail. & Corp. L. J. 86; McCord &c. Mercantile Co. *v.* Glen (Utah), 21 Pac. Rep. 500; School District No. 61 *v.* Collins (Dak.), 41 N. W. Rep. 466; Cravens *v.* Eagle Cotton Mills Co., 120 Ind. 6; *s. c.* 16 Am. St. Rep. 298; Town of Searcy *v.* Yarnell, 1 S. W. Rep. 319; *s. c.* 47 Ark. 269; Den *v.* Van Houten, 10 N. J. L. 270; McBroom *v.* Lebanon, 31 Ind. 268; Smelser *v.* Wayne &c. Turnpike Co., 82 Ind. 417; Singer Manuf. Co. *v.* Bennett, 28 W. Va. 16; Commercial Bank *v.* Pfeiffer, 108 N. Y. 242; Dutchess Cotton Man. Co. *v.* Davis, 4 Johns. (N. Y.) 237; *s. c.* 7 Am. Dec. 549; Sanger *v.* Upton, 91 U. S. 56; Buffalo &c. R. Co. *v.* Carey, 26 N. Y. 75; Chubb *v.* Upton, 95 U. S. 665; Henderson &c. R. Co. *v.* Leavell, 6 B. Mon. 358; John *v.* Farmers &c. Bank, 2 Blackf. (Ind.) 367; Hubbard *v.* Chappel, 14 Ind. 601; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Bank of Toledo *v.* International Bank, 21 N. Y. 542; Cong. Soc. *v.* Perry, 6 N. H. 164; Case *v.* Benedict, 9 Cush. (Mass.) 540; Woodson *v.* Bank, 4 B. Mon. (Ky.) 203; Worcester Medical Inst. *v.* Harding, 11 Cush. (Mass.) 285; Tar River Nav. Co. *v.* Neal, 3 Hawks (N. C.), 520; Douglass County *v.* Bolles, 94 U. S. 104; Butchers &c. Bank *v.* McDonald, 130 Mass. 264; Farmers &c. Bank *v.* Detroit &c. R. Co., 17 Wis. 372; West Winsted &c. Assn. *v.* Ford, 27 Conn. 282; Danbury &c. R. Co. *v.* Wilson, 22 Conn. 435; Bank of Gallipolis *v.* Trimble, 6 B. Mon. (Ky.) 599; Eaton *v.* Aspinwall, 6 Duer (N. Y.), 176; Peake *v.* Halley, 14 Ind. 383; Meikel *v.* German Sav. Fund Soc., 16 Ind. 181; Ryan *v.* Vanlandingham, 7 Ind. 416; Fort Wayne

§ 519. Illustrations of the Rule. — An apt illustration of the rule is furnished by a case where a person makes a *deed* conveying land to a corporation by its corporate name, and the deed is duly recorded, and thereafter such person makes *another deed* conveying the same land to A. B., and thereafter A. B. makes a deed conveying the same land to C. D. The estoppel which existed against the first grantor exists against C. D., and he will not be heard, in an action of ejectment against the tenant of the corporation, to set up a defect in the organization of the corporation, which might be available in a direct

&c. Turnp. Co. *v.* Deam, 10 Ind. 563; Ensey *v.* Cleveland &c. R. Co., 10 Ind. 178; Judah *v.* American Live Stock Ins. Co., 4 Ind. 333; Brookville &c. Turnpike Co. *v.* McCarty, 8 Ind. 392; Brownlee *v.* Ohio &c. R. Co., 18 Ind. 68; Board *v.* Bright, 18 Ind. 93; Ransom *v.* Priam Lodge, 51 Ind. 60; Williams *v.* Franklin Township Assn., 26 Ind. 310; Baker *v.* Neff, 73 Ind. 68; Franklin *v.* Twogood, 18 Iowa, 515; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 134; Kennedy *v.* Colton, 28 Barb. (N. Y.) 59; All Saints Church *v.* Lovett, 1 Hall (N. Y.), 191; Loaners Bank *v.* Jacoby, 10 Hun (N. Y.), 143; Connecticut Bank *v.* Smith, 17 How. Pr. (N. Y.) 487; Caryl *v.* McElrath, 3 Sand. (S. C.) 176; Tarbell *v.* Page, 24 Ill. 46; Cochran *v.* Arnold, 58 Pa. St. 399; Low *v.* Connecticut &c. R. Co., 45 N.H. 370, 378; Goodrich *v.* Reynolds, 31 Ill. 490; Swartwout *v.* Michigan &c. R.Co., 24 Mich. 389; Wood *v.* Coosa &c. R. Co., 32 Ga. 273; Rice *v.* Rock Island &c. R. Co., 21 Ill. 93; Owens *v.* Pierce, 5 Mo, App. 576; St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55; Hamtramck *v.* Bank of Edwardsville, 2 Mo. 169; Jones *v.* Bank of Tenn., 8 B. Mon. (Ky.) 122; *s. c.* 46 Am. Dec. 540; Montgomery R. Co. *v.* Hurst, 9 Ala. 513. The doctrine was denied in a forcible opinion by Mr. Justice Nelson, of the Supreme Court of New York, in Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480; *s. c.* 24 Am. Dec. 51. The case was that of a Canadian corporation, and there are indications here and there in the opinion of that celebrated jurist, that he did not take kindly to the assertion of rights or privileges in the courts of this country on behalf of British corporations or British subjects. Although his opinion is still regarded as authority on the general law of estoppel, it has been generally overruled in respect of this particular question. See also Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539; *s. c.* 5 Wend. (N. Y.) 478; U. S. Bank *v.* Stearns, 15 Wend. (N. Y.) 314. Nevertheless this doctrine has been followed to some extent in subsequent cases in the same State and elsewhere. First Baptist Soc. *v.* Papalee, 16 Wend. (N. Y.) 605; Buffalo &c. R. Co. *v.* Cary, 26 N. Y. 75; Loaners Bank *v.* Jacoby, 10 Hun (N. Y.), 143; DeWitt *v.* Hastings, 40 N. Y. Super. 463; Hargrave *v.* Bank, 1 Ill. 84; Gaines *v.* Bank, 12 Ark. 769; Boyce *v.* Trustees, 46 Md. 359; Bank *v.* Simonton, 2 Tex. 531; Halloway *v.* Memphis &c. R. Co., 23 Tex. 465; Owen *v.* Farmers Bank, 2 Doug. (Mich.) 134, note; Mitchell *v.* Rome &c. R. Co., 17 Ga. 574, 589. Among the cases holding contrary to the above, that a promissory note given to a company by its corporate name *estops* the maker from denying its corporate existence when sued upon the note, are Pacific Bank *v.* De Ro, 37 Cal. 538; John *v.* Farmers &c. Bank, 2 Blackf. (Ind.) 367; *s. c.* 20 Am. Dec. 119. See also Hughes *v.* Bank of Somerset, 5 Litt. (Ky.) 45.

proceeding by the State to forfeit its charter.[1] - - - - In like manner a person claiming under a deed which recites a mortgage in favor of a mortgagee bearing a corporate name, is estopped from disputing the corporate existence of such mortgagee.[2] This is in conformity with the general principle, that when a person executing a deed recites therein particular facts, those facts become conclusive against him, and also against those who derive title from him.[3] - - - - A bank was duly organized under an act of a territorial legislature, but could not legally exercise its powers until the charter creating it was approved by Congress. It was held that it was nevertheless a body corporate *de facto*, and that a party making a sale of real estate to it was estopped from thereafter questioning its capacity to take title after it had paid the consideration for the purchase.[4] Where the act under which the corporation was organized was consolidated by the adoption of a new constitution before the act of incorporation was accepted by the corporators, as the act of incorporation was originally valid, one who had contracted with the corporation was estopped to show that the corporators failed to organize under it while it remained in force.[5] - - - - Where a corporation takes a deed of trust upon land to secure a loan of money, and, upon a foreclosure and sale under the deed of trust, becomes the purchaser and brings ejectment for the possession, it is not necessary to introduce formal proof of its existence as a corporation, if the deed of trust, being in evidence, recites that fact.[6] - - - - It is no defense to an action by a *mutual insurance company* to collect assessments, to show that it met and chose officers before its charter went into effect, if subsequently to that time persons were found, with the consent and under the authority of the designated corporators and without objection on the part of the State, actually exercising the corporate powers and claiming and using the franchise.[7] So, it has been held that a debtor of a banking corporation, when sued upon an

[1] Broadwell *v.* Merritt, 87 Mo. 95. There is even a larger principle, by which estoppels *in pais* are visited upon those in *privity of estate* with an owner of land. Thus, if the owner of land would be estopped, by reason of his own acts and conduct, from setting up title thereto, those in privity with him, unless purchasers for value without notice, labor under a similar disability. Thistle *v.* Buford, 50 Mo. 278. See also Shew *v.* Beebe, 35 Vt. 205; Snodgrass *v.* Ricketts, 13 Cal. 359; Cooley *v.* Warren, 53 Mo. 166.

[2] Hassenritter *v.* Kirchhoffer, 79 Mo. 239.

[3] Herm. on Est., §§ 616, 629.

[4] Smith *v.* Sheeley, 12 Wall. (U. S.) 358.

[5] Snyder *v.* Studebaker, 19 Ind. 462 (overruling upon this point Harriman *v.* Southam, 16 Ind. 190).

[6] German Bank *v.* Stumpf, 6 Mo. App. 17.

[7] Appleton Mutual Fire Ins. Co. *v.* Jesser, 5 Allen (Mass.), 446.

acceptance, will not be heard to set up certain *frauds* by reason of which the bank was never legally organized.[1] McDonald, J., said: "If there were conditions precedent of the most imperative character in the charter, and a grossly *fraudulent organization* had been gotten up by collusion between the commissioners and the subscribers for stock, and the bank had been put into operation apparently fairly, and held out to the community as a regularly and honestly organized bank, discounting notes and paying out bills, it would be a strong act of injustice to hold that the fraud in the organization could be pleaded collaterally, as a defense by the bank, against the payment of its notes, or by a debtor to the bank, to defeat the collection of the debt due by him. The bank should not be allowed to take advantage of its own wrong; and the debtor of the bank, who has received an equivalent for his note, ought not to be allowed to avail himself of a defense of the sort, to diminish the means of paying the debts of the bank."[2]

§ **520. Various Statements of this Rule.**— Some variations are met with in the statements of the rule. It is sometimes said that a party who enters into a contract with an assumed corporation, in its corporate name, thereby *admits* it to be duly constituted a body politic and corporate under such name.[3] It is also said that the execution of a note or deed to a corporation is *prima facie evidence* of the lawful existence of the corporation,[4] or of the existence of a charter and of user under it, under a plea of *nul tiel corporation*.[5]

§ **521. Corporate Existence Proved by Showing that the Objecting Party has Dealt with it as Such.**— General expressions are found in many cases which do not confine the grounds of the estoppel to the fact that the party challenging the existence of the corporation has executed to the corporation, in its corporate name, the obligation sued on, but which go further and say that, where the legal existence of a corporation is challenged in a collateral proceeding, it may be proved by showing that the party challenging it has *dealt generally* with the corporation, under such circumstances as impliedly did assume its cor-

[1] *Post*, § 529.

[2] Southern Bank *v.* Williams, 25 Ga. 534, 536.

[3] Franz *v.* Teutonia Building Asso., 24 Md. 259.

[4] Brown *v.* Scottish American Mortgage Co., 110 Ill. 235.

[5] Montgomery Railroad *v.* Hurst, 9 Ala. 513.

porate existence. This being shown, he will according to some of these expressions be estopped, in a subsequent litigation with the corporation or its receiver, assignee, or other legal representative, from denying its corporate existence.[1] A person so dealing with a corporation will not be heard to assert that, by reason of some irregularity in its organization, it is no more than a voluntary association and its stockholders liable as partners.[2] The better conception is believed to be that the mere fact of the party against whom the estoppel is claimed, having dealt with the alleged corporal *in some other matter*, does not estop him from denying its corporate existence, but is at most an *evidentiary fact*, on the footing of an *admission*, tending to prove the existence of the corporation. A qualified statement, gleaned from a decision in Michigan, is that when a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name, is estopped to deny its corporate existence, except where there are no facts which make it legally unjust to forbid such a denial.[3]

§ 522. Rule Restrained to Cases of De Facto Corporations.—The rule as stated in a preceding section [4] leaves entirely out of view any question as to the rightfulness of the assumption of corporate existence by the party claiming it. It nakedly is that one who enters into a written obligation with an assumed or pretended corporation, thereby admits its corporate existence, and estops himself from denying it, in an action by the corporation to enforce the obligation. In a numerous class of cases, many of them recent ones, the rule is so stated as to be restrained in its operation to cases of *colorable* or *de facto* corporations. In these cases the proposition is frequently formulated that a person who contracts with a *de facto* corporation cannot, in an action against him on the contract, impeach the legality of its organization;[5] or that one who contracts with a corporation

[1] Bank of Circleville *v.* Renick, 15 Oh. 322; Spahr *v.* Farmers Bank, 94 Pa. St. 429. Compare Freeland *v.* Pennsylvania Central Ins. Co., 94 Pa. St. 504.

[2] Tarbell *v.* Page, 24 Ill. 46; Lehman *v.* Warner, 61 Ala. 455; restated in Sherwood *v.* Alvis, 83 Ala. 115; *s. c.* 3 Am. St. Rep. 695.

[3] Estey Man. Co. *v.* Runnels, 55 Mich. 130; *s. c.* 20 N. W. Rep. 823.

[4] *Ante*, § 518.

[5] Butchers & Drovers' Bank *v.* McDonald, 130 Mass. 264; Winget *v.*

which has a *de facto* existence, that is to say, the *reputation* of being a legal corporation in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to defeat the contract or to avoid the liability he has voluntarily and deliberately incurred.[1] Some of the cases merely state the fact, as shown by the evidence of the *de facto* existence of the corporation under a colorable organization, to strengthen the rule which raises the estoppel,[2] without implying that even a *de facto* organization is necessary to the rule. Others distinctly imply that proof of a *de facto* organization is also necessary,—such as evidence of proceedings in professed compliance with a law authorizing the organization of the corporation, and *slight evidence* of subsequent user.[3] "The distinction," says one court, "is between an entire absence of authority in the organic law itself, and a failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case, there is a want of power to act; in the other, only an abuse of power conferred.[4] One statement of the rule is that the person contracting with an association assuming to be, and believed by the person to be, incorporated, and acting in a corporate capacity, cannot, after having *received the benefit* of the contract, set up as a defense to an action brought by the company or its assignee, that the company was not legally incorporated.[5] Similarly, it has been held that a person who has made a promissory note to a body claiming or purporting to be a corporation cannot, in an action thereon, avoid the estoppel resulting from such admission of the existence of the corporation at the time, by an answer alleging that when he made the note he believed the payee was a corporation, but afterwards discovered that it was not.[6]

Quincy Building &c. Assn. 128 Ill. 67; *s. c.* 21 Northeast. Rep. 12; White *v.* Ross, 4 Abb. App. Dec. (N. Y.) 589.

1 Central Ag. &c. Asso. *v.* Alabama &c. Co., 70 Ala. 120; *s. c.* 9 Am. Corp. Cas. 8, 13.

2 Commissioners of Douglas Co. *v.* Bolles, 94 U. S. 104; National &c. Ins. Co. *v.* Yoemans, 8 R. I. 25; Providence &c. Ins. Co. *v.* Murphy, 8 R. I. 131.

3 Merriman *v.* Magiveny, 12 Heisk. (Tenn.) 494.

4 Sherwood *v.* Alvis, 83 Ala. 115; *s. c.* 3 Am. St. Rep. 690; opinion by Stone, C. J.

5 Booske *v.* Gulf Ice Co., 24 Fla. 550; 5 So. Rep. 247.

6 Ransom *v.* Priam Lodge, 51 Ind. 60.

§ 523. This Estoppel not Raised where there is no Law Authorizing the Corporation. — In the view of some courts this estoppel extends only to matters of *fact*. By analogy to a principle already stated,[1] no such estoppel arises in cases where there is *no law* authorizing the existence of any such corporation at all, as the one which assumes to exist; and the same is true, according to the same opinion, of cases where the law under which the corporation claims to exist is *unconstitutional*; for a *void* statute is the same as no law at all.[2] The Supreme Court of Indiana have said: "The estoppel goes to the mere *de facto* organization; not to the question of legal authority to make an organization. A *de facto* corporation, that, by regularity of organization, might be one *de jure*, can sue and be sued. And a person who contracts with such corporation while it is acting under its *de facto* organization, who contracts with it as an organized corporation, is estopped, in a suit on such contract, to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence, if an organization is completed, where there is *no law*, or an *unconstitutional law*, authorizing an organization as a corporation, the doctrine of estoppel does not apply."[3] The Supreme Court of Michigan have laid down the general rule in the following language: "Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate, alike of justice and of public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised."[4] The

[1] *Ante*, § 505.

[2] Harriman *v.* Southam, 16 Ind. 190; Brown *v.* Killian, 11 Ind. 449; Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275; Snyder *v.* Studebaker, 19 Ind. 462, overruling upon this point Evansville &c. R. Co. *v.* Evansville, 15 Ind. 395.

[3] Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275, 278.

[4] Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389, 393.

same court have further said: "But both in reason and on authority, the ruling should be the same where an attempt has been made to organize a corporation under a general law permitting it. If due authority existed for the corporation, and the question is one of regularity merely, 'the rule established by law, as well as reason, is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization.'"[1] But the same court, in a very recent case, have said: "It is undoubtedly well settled that a person who has entered into contract relations with a *de facto* corporation cannot, in an action thereon, deny its corporate character or set up any informality in its organization to defeat the action. The distinction between such cases and the present one is clear. If there had been any law under which defendants had a right to incorporate, and the offer had been to show a mere abuse or excess of its corporate powers, or had it appeared that it was a *de facto* corporation, and the question related to the regularity of its organization merely, there could be no doubt that the plaintiff would be estopped from questioning its corporate existence. But the two things necessary to show a corporation, even *de facto*, do not exist. There is no law under which the powers they assume might lawfully be created; and the mere fact that they assumed to act as such, even in the full belief that they were legally incorporated, would not constitute them a corporation *de facto*.[2]

§ 524. View that Incorporation must be Stated in the Contract. — A few cases of doubtful authority have restrained the rule so far as to hold that the fact that, in a contract with an association or company, the defendant in the action has designated it by a *name* which is *appropriate to a corporate body*, does not admit its legal existence as a corporation, unless it be distinctly stated in the contract that the company is an incorporated company; but that it admits only the existence of an association acting under that name.[3] It has been held that, *in-*

[1] *Ibid.* 395. See also Merchants' &c. Bank *v.* Stone, 38 Mich. 779.

[2] Eaton *v.* Walker, 76 Mich. 579, 589.

[3] Holloway *v.* Memphis &c. R. Co., 23 Tex. 465; *s. c.* 76 Am. Dec. 68; Williams *v.* Bank of Michigan, 7 Wend. (N. Y.) 539; Welland Canal Co. *v.* Hathaway, 8 Wend. (N. Y.) 480.

dorsing a bill of exchange to a bank does not admit that the bank is a corporation.[1] And more recently there is a decision to the effect that the mere fact of mentioning, in a promissory note, a particular bank as the place of payment of the note, does not preclude the maker from disputing the corporate existence of the bank.[2] But the contrary and more general statement of the rule is that one who executes a written obligation to an obligee, by a name which imports that it is a corporation, is by that fact estopped, in an action thereon to deny the corporate existence of the payee.[3]

§ 525. **Exception where Party is Induced by Fraud to Recognize Corporate Existence.**— An exception to the rule has been declared in Michigan in the case where no new rights have accrued from the transaction, and where the recognition of the existence of the corporation is fraudulently procured for the purpose of entrapping the party into the action upon which the recognition is based.[4]

§ 526. **Party Dealing with Corporation Permitted to Show Want of Knowledge.**— In every estoppel *in pais* it is an essential to the operation of the principle that the person against whom it is sought to raise the estoppel, should either have known the state of facts out of which the estoppel springs, or else should have been in such a situation that it was in law his duty to know it,— that is, in a situation where negligent ignorance is, in law, tantamount to actual knowledge.[5] He is therefore ordinarily entitled

[1] Hargrave *v.* Bank of Illinois, 1 Ill. 84.

[2] Hungerford Nat. Bank *v.* Van Nostrand, 106 Mass. 559.

[3] Studebaker &c. Co. *v.* Montgomery, 74 Mo. 101. Barbaro *v.* Occidental Grove, 4 Mo. App. 429; U. S. Express Co. *v.* Bedbury, 34 Ill. 459. So held where a note was made payable to the order of "the Missouri City Savings Bank." Much less can it be reasoned that, where the payee does, by the name by which it is described in the note, bring a suit thereon and recover a judgment, the judgment is void and not a lien upon real estate. Stoutimore *v.* Clark, 70 Mo. 471.

[4] Doyle *v.* Mizner, 40 Mich. 160; *s. c.* 3 N. W. Rep. 968.

[5] The essential idea of an estoppel *in pais* is that he who will not speak when he *should*, will not be heard to speak when he *would*. It is essential to this idea that he either had knowledge, or owed the other party the duty of knowing the facts out of which the estoppel springs; and it is therefore often said in general terms that *silence without knowledge* will not work an estoppel: Frederick *v.* Missouri &c.

to show that he had no knowledge of such a state of facts. When, therefore, in a case involving the question whether the plaintiff had dealt with the defendants as a corporation or as a partnership, he having sued them as individuals, a finding of fact that he had full knowledge that they were a corporation, and dealt with them as such, was held not supported by evidence of publications made by the defendants of statements showing their incorporation and of the mailing of letters and circulars to the plaintiff showing such fact, which were not shown to have been received,— especially where the court excluded the testimony of the plaintiff denying his knowledge or information of the existence of the corporation; and moreover such exclusion was error.[1]

§ 527. **Party Claiming under Legislation Creating a Corporation Estopped to Deny its Existence.** — Obviously a party cannot deny the existence of a corporation by assailing the validity of an act of the legislature by which the corporation has been reorganized or at least endowed with its present name, when his only standing in court is derived from the same act of the legislature. Thus, in a suit in equity to foreclose a *railway mortgage*, a holder of second mortgage bonds, in an answer and cross bill, challenged the corporate existence of the railway company which had issued the bonds. The bonds under which this defendant claimed a standing in court were executed by the corporation by the name which it had assumed under the act of the legislature whose validity the defendant challenged. The mortgage itself, in its preamble, recited the act of the legislature. "In view of these facts," said Mr. Justice Bradley, "we think that the appellant is estopped from denying the corporate existence of the company whose bonds he thus holds, and by virtue of which he acquires a *locus standi* in the suit. Irregularities and even fraud committed in making the purchase authorized by the act, and failure to perform strictly all the requisites for changing the company's name, cannot avail the appellant, occupying the position he does in this suit, to deny the corporate existence of the

R. Co., 82 Mo. 402; Spurlock *v.* Sproule, 72 Mo. 503; Collins *v.* Rogers, 63 Mo. 515; Evans *v.* Snyder, 64 Mo. 516.

[1] Eaton *v.* Walker, 76 Mich. 579; *s. c.* 43 N. W. Rep. 638.

Alabama & Chattanooga Railroad Company. He waived all such objections when he took the bonds, and came into court only as a holder and owner thereof. The irregularities on which he relies might, perhaps, have been sufficient cause for a proceeding on the part of the State to deprive the company of its franchises, or on the part of third persons who may have been injuriously affected by the transactions. But neither the State nor any other persons have complained; and it is not competent for the appellant to raise the question in this collateral way, for the purpose of gaining some supposed advantage over other creditors of the same company, who have relied on its corporate existence in the same manner that he has done."[1]

§ 528. Stockholder Estopped to Deny Corporate Existence.— A frequent application of the foregoing doctrine is met with in actions by corporations against subscribers to their capital stock to recover assessments made thereon by the board of directors. In those cases it is generally held that one who has subscribed for stock in the plaintiff company by its corporate name, is, when so sued, estopped from setting up as a defense that the plaintiff has no corporate existence.[2] And this estoppel extends equally to its members in any proceeding instituted to charge them with liability in respect of their membership.[3] If, beyond this, it appears that the subscriber to the stock participated in the organization of the corporation, as by attending and voting at an election of directors,[4] or by serving as a trustee himself,[5] he will be estopped from disputing the validity of its organization, on grounds which we shall not turn aside to discuss now, but which will be more fully considered hereafter.[6]

[1] Wallace *v.* Loomis, 97 U. S. 146; *s. c.* 10 Myer Fed. Dec., § 21.

[2] Dutchess Cotton Man. *v.* Davis, 14 Johns. (N. Y.) 238; *s. c.* 7 Am. Dec. 459; Ohio &c. R. Co. *v.* McPherson, 35 Mo. 13, 26; *s. c.* 86 Am. Dec. 128; Chester Glass Co. *v.* Dewey, 16 Mass. 94; *s. c.* 8 Am. Dec. 128; Stoops *v.* Greensburg &c. R. Co., 10 Ind. 47; Ensey *v.* Cleveland R. Co., 10 Ind. 178; Ft. Wayne &c. Turnp. Co. *v.* Deam, 10 Ind. 563.

[3] *Post*, § 1849, *et seq.;* Ossipee Man. Co. *v.* Canney, 54 N. H. 295; Swartwout *v.* Michigan &c. R. Co., 24 Mich. 389.

[4] Henderson &c. R. Co. *v.* Leavell, 16 B. Mon. (Ky.) 358.

[5] Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; Hunt *v.* Kansas &c. Bridge Co., 11 Kan. 412.

[6] *Post*, § 1972, *et seq.*

§ 529. **Estoppel to Set up Fraudulent Organization.**—Creditors of a corporation who have dealt with it knowing that it was fraudulently constituted, and stockholders who have accepted the charter and assisted in putting it in operation, cannot show in a suit by or against a corporation, that the charter was obtained by fraud.[1] And, generally, one who has entered into a contract with a corporation is estopped by his contract, from setting up the fraudulent organization of the corporation, in defense to a suit brought by it against him.[2]

§ 530. **Exception where the Corporation has Expired by Lapse of Time.**— There is much judicial authority for the proposition that where a corporation is brought to an end by lapse of time, that is, by the *expiration* of the distinct *limitation* of its life in its charter, any further exercise of its corporate powers may be questioned collaterally.[3] The governing principle here is that, upon the expiration of the term limited by the charter for the existence of the corporation, its dissolution is complete. "The dissolution in such a case," it has been said, "is declared by the act of the legislature itself. The limited time of existence has expired, and no judicial determination of that fact is requisite. The corporation is *de facto* dead."[4] In line with this view, it is held that the *estoppel* spoken of in a preceding section[5] does not extend so far as to preclude a party from showing that, since the

[1] Cochran *v.* Arnold, 58 Pa. St. 399, Smith *v.* Heidecker, 39 Mo. 157; Patterson *v.* Albany &c. Assn., 63 Ind. 373; Bear Camp River Co. *v.* Woodman, 2 Me. 404; Charles River Bridge *v.* Warren Bridge, 7 Pick. (Mass.) 371.

[2] Jones *v.* Cincinnati &c. Co., 14 Ind. 89; Hubbard *v.* Chappell, 14 Ind. 601; Evansville &c. R. Co. *v.* Evansville, 15 Ind. 395; Meikel *v.* German Savings &c. Soc., 16 Ind. 181; Brownlee *v.* Ohio &c. R. Co., 18 Ind. 68; Commissioners *v.* Bright, 18 Ind. 93; Washington College *v.* Duke, 14 Iowa, 14; Hamtramck *v.* Bank of Edwardsville, 2 Mo. 169; Camp *v.* Byrne, 41 Mo. 525; Congregational Soc. in Troy *v.* Perry, 6 N. H. 164; Cochran *v.* Arnold, 58 Pa. St. 399; All Saints Church *v.* Lovett, 1 Hall (N. Y.), 191; John *v.* Farmers &c. Bank, 2 Blackf. (Ind.) 367.

[3] People *v.* Manhattan Co., 9 Wend. (N. Y.) 351, 382, per Sutherland, J.; Morgan *v.* Lawrenceburg Ins. Co., 3 Ind. 285, per Blackford, J.; Wilson *v.* Tesson, 12 Ind. 285, per Perkins, J.; Grand Rapids Bridge Co. *v.* Prange, 35 Mich. 400; *s. c.* 24 Am. Rep. 585; Dobson *v.* Simonton, 86 N. C. 492.

[4] Sturges *v.* Vanderbilt, 73 N. Y. 384, 390, per Rapallo, J. See also Bank of United States *v.* McLaughlin, 2 Cranch C. C. (U. S.) 20.

[5] *Ante,* § 518.

contract with the corporation was entered into, it has ceased to exist.[1] As hereafter more fully shown,[2] when a corporation expires by limitation of time or is judicially dissolved, it can no longer prosecute or defend an action, in the absence of some saving provision in its governing statute. An action can no more be prosecuted against a dead corporation than against a dead man.[3] In such a case the opposing party *suggests the death* of the corporation, and, upon the fact being admitted or proved, the suit *abates*,[4]—just as an action for an injury to the person abates on suggestion of the death of the defendant, unless there is a saving statute allowing it to be revived against his legal representative.[5] The estoppel already spoken of relates, therefore, only to the *time* of entering into the contract with the corporation, and does not admit that there cannot be or has not been a dissolution of it.[6] Carrying this view still further, it has been held that if the corporate existence has been terminated by an *act of forfeiture*, or otherwise, before the commencement of the suit, the facts producing this result may be specifically set forth by plea, and the court may judge whether they have this effect.[7] Applying the doctrine, we find a ruling to the effect that a stockholder who, after expiration of the charter of a corporation, has sold land belonging to it, as if recognizing its continued existence, is not thereby estopped to set up such expiration in defense of an action for the proceeds, brought in the name of the corporation.[8] On the other hand, it has been ruled in Missouri that the question whether the charter of a corporation has expired by limitation of time, can be *adjudicated* only *in a direct proceeding* by the State,—that such a defense cannot be set up collaterally in an action by the corporation.[9] And in West Virginia, a private business

[1] Ensey *v.* Cleveland R. Co., 10 Ind. 178; Ft. Wayne Turnp. Co. *v.* Deam, 10 Ind. 563.

[2] *Post*, § 3367.

[3] Mumma *v.* Potomac Co., 8 Pet. (U. S.) 281; Pomeroy *v.* People, 1 Wall. (U. S.) 23.

[4] Terry *v.* The Bank of America, 77 Ga. 177; *s. c.* 9 Am. Corp. Cas. 45.

[5] See Bank of Gallipolis *v.* Trimble, 6 B. Monr. (Ky.) 599.

[6] Trustees *v.* Hills, 6 Cow. (N. Y.) 23; *s. c.* 16 Am. Dec. 429, 431.

[7] Jones *v.* Bank of Tennessee, 8 B. Mon. (Ky.) 122.

[8] Krutz *v.* Paola Town Co., 20 Kan. 397.

[9] St. Louis Gas Light Co. *v.* City of St. Louis, 84 Mo. 202; affirming *s. c.* 11 Mo. App. 55.

corporation, duly organized under the laws of that State, which failed to wind up its business when its charter expired, but continued in its charter name to carry on its corporate business, may be sued in its corporate name for a tort, committed by it after its charter had expired.[1] If the fact of the expiration of the charter is not suggested by the opposing party, the *suggestion* may be made *by the attorney* who has represented the corporation in the litigation.[2] There is authority to the effect that the fact that the corporation has ceased to exist prior to the commencement of the suit may be pleaded *in abatement*, though *not in bar*.[3] But this draws us into questions of *pleading*, which are reserved for a future portion of this work.[4]

§ 531. Forfeiture for Misuser or Non-user not Pleadable Collaterally. — But, in the absence of an express statute otherwise providing, the question whether the charter of a corporation has been forfeited for *misuser* or *non-user* of its franchises, or for any other cause save the efflux of time, cannot be determined in a collateral proceeding, but can only be determined in a direct proceeding instituted by the State.[5] Although a

[1] Miller *v.* Coal Co., 31 W. Va. 836; *s. c.* 8 S. E. Rep. 600.

[2] "The attorney for the corporation may well suggest the death of the corporation, by plea or otherwise, on the record." Greeley *v.* Smith, 3 Story (U. S.), 657, 659. In Foster *v.* Essex Bank, 16 Mass. 244, the attorneys who were originally retained by the directors of the defunct corporation filed a suggestion in their own names that, since the last term of court, the corporation had been dissolved by the expiration of the time limited for its duration in the act of its incorporation.

[3] Dental Vulcanite Co. *v.* Wetherbee, 2 Cliff. (U. S.) 555; Meikel *v.* German Saving Fund Society, 16 Ind. 181.

[4] *Post,* Ch. 184, Art. II. The expiration of the charter of the bank will not work an abatement of an action brought against its directors to charge them with a personal liability for a violation of law in the management of the bank. Moultrie *v.* Smiley, 16 Ga. 289.

[5] Slee *v.* Bloom. 5 Johns. Ch. (N. Y.) 366, 381; Hughes *v.* Bank, 5 Litt. (Ky.) 45; John *v.* Farmers &c. Bank, 2 Blackf. (Ind.) 367; Buncomb Turnp. Co. *v.* McCarson, 1 Dev. & B. (N. C.) 306; McFarlan *v.* Triton Ins. Co., 4 Den. (N. Y.) 392; Ohio &c. R. Co. *v.* McPherson, 35 Mo. 13; Bank of Gallipolis *v.* Trimble, 6 B. Mon. (Ky.) 599; Planters' Bank *v.* Bank of Alexander, 10 Gill & J. (Md.) 346; Farmers' Bank *v.* Garten, 34 Mo. 119; State *v.* Bredow, 31 Mo. 523, 528; Rice *v.* Rock Island &c. R. Co., 21 Ill. 93; Williams *v.* Bank, 6 Ill. 667; Hammett *v.* Little Rock &c. R. Co., 20 Ark. 204; Bank of Circleville *v.* Renick, 15 Ohio, 322; Asheville Division *v.* Aston, 92 N. C. 578; Logan *v.* Vernon &c. R. Co., 90 Ind. 552; Atlanta *v.* Gate City Gas Light Co., 71 Ga. 106; Barren Creek Ditching Co. *v.*

statute expressly declares that, upon the happening of certain events, the corporation "shall be deemed to have surrendered the rights, privileges and franchises granted by any act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved," [1] and it further appears that the conditions upon which such dissolution may be declared have been fulfilled, the corporation nevertheless remains *in esse* and may be sued by its creditors unless restrained by injunction until the surrender of its franchises has been judicially declared in a direct proceeding.[2] So, it is no defense to a suit brought by a corporation for goods sold, etc., that, for a failure to pay a license tax to the State, the Secretary of State by publication, had declared the corporate charter forfeited.[3] But, by analogy to the principle stated in the preceding section, when the forfeiture has been *judicially declared*, the corporation is *dead*, and upon that fact being admitted or shown, the suit *abates*, unless there is a saving statute permitting it to go on.[4]

§ 532. Corporation Estopped to Deny Corporate Existence.—This estoppel works both ways. Under its operation the corporation itself, when proceeded against as such, on an obligation which it has made in its corporate name and character, is estopped to deny the regularity of its organization,[5] or otherwise to deny the validity of its corporate existence.[6] Stated

Beck, 99 Ind. 247; Vernon Society *v.* Hills, 6 Cow. (N. Y.) 23; Lehigh Bridge Co. *v.* Lehigh Coal &c. Co., 4 Rawle (Pa.), 9; All Saints Church *v.* Lovett, 1 Hall (N. Y.), 192; State of Vermont *v.* Society &c., 1 Paine (U. S.), 652; Merick *v.* Van Santvoord, 34 N. Y. 208; Barclay *v.* Talman, 4 Edw. Ch. (N. Y.) 123; Pohquioque Bank *v.* Bethel Bank, 36 Conn. 325; *s. c.* 4 Am. Rep. 80.

[1] 1 Rev. Stat. N. Y. 463, § 38.

[2] Mickles *v.* Rochester City Bank, 11 Paige (N. Y.), 118; *s. c.* 42 Am. Dec. 103; Kincaid *v.* Dwinelle, 59 N. Y. 548.

[3] Lumber Co. *v.* Ward, 30 W. Va. 43.

[4] See cases cited *supra*, also Sutherland *v.* Lagro &c. Plank Rd. Co., 19 Ind. 192.

[5] Southern Bank *v.* Williams, 25 Ga. 534.

[6] Ewing *v.* Robeson, 15 Ind. 26; Callender *v.* Painesville &c. R. Co., 11 Oh. St. 516; Knapp *v.* Joy, 9 Mo. App. 47 and 575; Rush *v.* Steamboat Co., 84 N. C. 702; Adams Express Co. *v.* Hill, 43 Ind. 157; Callender *v.* Painesville, &c. R. Co., 11 Oh. St. 516; United States Express Co. *v.* Bedbury, 34 Ill. 459, 467; McCullough *v.* Talladega Ins. Co., 46 Ala. 376; DeWitt *v.* Hastings, 40 N. Y. Super. 463, 476. In the view of some courts the execution of a written contract by a corporation *in*

more broadly, the proposition is that, when *an association of persons* assume a name, which implies a corporate body, and exercise *corporate powers*, they should not be heard to deny that they are a corporation.[1] Thus, where individuals have held themselves out as a society with corporate powers, have held meetings as such, and in one such meeting, duly called, have employed a person to render services for them,— they cannot require him to prove, in an action against them for the value of his services, by their act of incorporation or written constitution, that they are empowered to act as they have assumed to do.[2] There is a modified view that, where an action is brought on a paper purporting to have been issued by the defendant in a corporate form or character, and the defendant pleads that it was unincorporated when it issued the certificate in question, the plea may be overthrown by evidence tending to show that the defendant was a *de facto* corporation at the time.[3] Another court goes so far as to hold that the fact that a body has held itself out as a corporation, treating with the plaintiff as such, does not estop it from denying its liability as a corporation, where there is a statute which expressly prescribes certain acts to be done in order to constitute a corporation, and those acts have not been done. The court reasoned that the omission of such statutory requisites cannot be supplied by the application of the doctrine of estoppel.[4] But this is not put forward by the writer as the prevailing view. In the view of most courts there would, on the state of facts just set forth, be a complete estoppel, and the party claiming the benefit of the estoppel would not be required even to go so far as to prove that the corporation was a colorable or *de facto* corporation. So long as the State does not interfere, it is unnecessary to inquire into the rights of the people in relation to it.[5] And though the corporation may have forfeited its charter by an act which might be judicially declared a

its corporate name is such an *admission* of incorporation as will, in an action by the other party to the contract, make out a *prima facie* case on that point. Real Estate Sav. Inst. *v.* Fisher, 9 Mo. App. 593.

[1] United States Express Co. *v.* Bedbury, 34 Ill. 459.

[2] Stone *v.* Berkshire Cong. Society, 14 Vt. 86.

[3] Jewell *v.* Grand Lodge, 41 Minn. 405; *s. c.* 43 N. W. Rep. 88.

[4] Boyce *v.* Trustees, 46 Md. 359.

[5] Abbott *v.* Aspinwall, 26 Barb. (N. Y.) 202.

cause of forfeiture, yet it cannot absolve itself from legal responsibility by alleging the fact which might produce the forfeiture.[1] A corporation may also be estopped *by its conduct* in the particular judicial proceeding, — as by *appearing* and *answering* in its corporate name,[2] or by executing in that name an *appeal bond*.[3]

§ 533. **Corporations for Illegal Purposes.** — But does the same rule apply to the defense that the corporation was organized for an illegal purpose? The authorities upon this point are few. The Supreme Court of Nebraska, by analogy to the rule that a citizen cannot, in general, raise the defense that the corporation was irregularly organized, holds that the defense cannot be made that the corporation was illegally organized and for an illegal purpose.[4] Perhaps this can hardly be maintained as a general proposition. A distinction may be taken in this connection, namely, that when the corporation is organized ostensibly for a legal purpose, as in the case just noticed, this defense cannot be raised; but where it appears, as is possible in the case of corporations organized under general laws, that the association although incorporated under the forms of law, is for a purpose unwarranted by the terms of the general law, it would seem that this fact might be shown.[5] Accordingly, a better statement of the doctrine under discussion would seem to be that a person contracting with an ostensible corporation, to do an act *not prohibited by law* is *estopped* in an action by the corporation on the contract, to deny the existence of the corporation or its power to enter into such a contract.[6]

[1] Hughes *v.* Bank of Somerset, 5 Litt. (Ky.) 47. See also Searsburgh Turnp. Co. *v.* Cutler, 6 Vt. 315.

[2] *Post,* Chs. 180, 184.

[3] *Post,* Ch. 184, Art. I. East Tennessee &c. R. Co. *v.* Evans, 6 Heisk. (Tenn.) 609.

[4] Lincoln Building, Assn. *v.* Graham, 7 Neb. 173.

[5] *Ante,* § 523.

[6] Oregonian Ry. Co. *v.* Oregon Ry. & Nav. Co., 23 Fed. Rep. 233; Town of Searcy *v.* Yarnell, 47 Ark. 269; 1 S. W. Rep. 319, 322.

CHAPTER XII.

CONSTITUTIONAL RESTRAINTS UPON THE CREATION OF CORPORATIONS AND THE GRANTING OF CORPORATE PRIVILEGES.

ARTICLE I. PROVISIONS OF VARIOUS STATE CONSTITUTIONS.

§ 538. **Scope of this Chapter.** — It is proposed to consider in this chapter a subject which might better perhaps have been considered at an earlier stage of the discussion, but which, in the struggle of other subjects for precedence, has been postponed until now. Constitutional provisions exist in most of the States imposing restraints upon the legislature, in respect of the granting of special charters and of the passing of laws, either general or special, conferring corporate powers or privileges. These are especially frequent in the more recent constitutions which have been adopted in some of the States, and in the constitutions of the newly admitted States. So far as they relate to restraints of a general and miscellaneous character and those which are common to all corporations, they are collected and given in the present article, with the exception of those of the constitutions of the newly admitted States of North Dakota and South Dakota, which constitutions were not, down to the time of going to the press, accessible to the writer. So far as they relate to particular corporations, such as railway companies, telegraph companies, and the like, they are given in the chapters relating to those corporations. So far as they relate to subjects which have been set apart for special discussion, they are postponed and given in those chapters, — as, for instance, that relating to the right of eminent domain.[1]

§ 539. **Corporations not to be Created by Special Laws.** — "The general assembly shall pass no special act conferring corporate powers, except for charitable, educational, penal or reformatory purposes, where the corporations created are to be and remain under the patronage and control of the State."[2] - - - - "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Granting to any corporation, association, or individual any special or exclusive right, privilege or immu-

[1] *Post*, Ch. 122.

[2] Ark. Const. of 1874, art. 12, § 2.

nity."[1] - - - - "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . chartering or licensing ferries or toll-bridges; . . . granting to any corporation, association, or individual the right to lay down railroad tracks; granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."[2] - - - - "No charter of incorporations shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the State; but the general assembly shall provide by general laws for the organization of corporations hereafter to be created."[3] - - - - "The general assembly shall not pass local or special laws in any of the following enumerated cases, — that is to say, for . . . granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever."[4] - - - - "Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purposes."[5] - - - - "No corporation shall be created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the State; but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."[6] - - - - "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."[7] - - - - "The general assembly shall not pass any local or special law creating corporations, or amending, renewing, or extending, or explaining the charter thereof. . . . Granting to any corporation, association, or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track."[8] - - - - "No corporation, after the adoption of this constitution, shall be created by special laws; nor shall any existing charter be extended, changed, or amended by special laws, except those for charitable, penal, or reformatory purposes, which are under the patronage and control of the State."[9] - - - - "The legislature shall not

[1] Cal. State Const. 1879, art. 4, § 25, div. 19.

[2] Col. Const. of 1876, art. 5, § 25.

[3] Col. Const. of 1876, art. 15, § 2.

[4] Ill. Const. of 1870, art. 4, § 22.

[5] *Ibid.*

[6] Ill. Const. of 1870, art. 11, § 1.

[7] Kan. Const. of 1859, art. 12, § 1.

[8] Mo. Const. of 1875, art. 4, § 53.

[9] Mo. Const. of 1875, art. 12, § 2.

pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose. Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."[1] - - - - "The general assembly shall not pass any local or special law . . . relating to ferries or bridges, or incorporating ferry or bridge companies, except for the erection of bridges crossing streams which form boundaries between this and any other State; regulating labor, trade, mining, or manufacturing; creating corporations, or amending, renewing, or extending the charters thereof; granting to any corporation, association, or individual any special or exclusive privilege or immunity, or to any corporation, association, or individual the right to lay down a railroad track."[2] - - - - By the constitution of Idaho, the general assembly shall pass no law . . . chartering or licensing ferries, bridges, or roads . . . creating any corporation."[3] - - - - "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Chartering or licensing ferries or bridges or toll roads; chartering banks, insurance companies and loan and trust companies; . . . granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever; . . . relinquishing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or person to this State, or to any municipal corporation therein. . . . In all other cases where a general law can be made applicable, no special law shall be enacted."[4] - - - - "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations hereafter to be created; *provided*, that any such laws shall be subject to future repeal or alterations by the legislative assembly."[5] - - - - "The legislature is prohibited from enacting any private or special laws in the following cases: . . . 3. For authorizing persons to keep ferries wholly within this State. . . . 6. For granting corporate powers or privileges. . . . 10. Releasing or extinguishing in whole, or in part, the indebtedness, liability or other obligation of any person, or corporation to this State, or to any municipal corporation therein."[6]

[1] Neb. Const. of 1875, art. 3, § 1b.
[2] Penn. Const. of 1873, art. 3, § 7.
[3] Const. Idaho, 1889, art. 3, § 19.
[4] Const. Montana, 1889, art. 5, § 26.
[5] Const. Montana, 1889, art. 15, § 2.
[6] Const. Wash. 1889–90, art. 2, § 28.

§ **540. But only under General Laws.**— "Corporations may be formed under general laws . . . "[1] - - - - - "Corporations may be formed under general laws, but shall not be created by special act."[2] - - - - "Corporations may be formed under general laws, but shall not be created by special act, except for municipal, manufacturing, mining, immigration, industrial, and educational purposes, or for constructing canals, or improving navigable rivers and harbors of this State, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws."[3] - - - - "The legislature shall have power to enact a general incorporation act to provide incorporation for religious, charitable, literary, and manufacturing purposes, for the preservation of animal and vegetable food, building and loan associations, and for draining low lands; and no attempt shall be made in such act or otherwise, to limit or qualify the power of revocation reserved to the legislature in this section."[4] - - - - "The legislature shall provide by general law for incorporating such municipal, educational, agricultural, mechanical, mining and other useful companies or associations as may be deemed necessary."[5] - - - - "Corporations, other than banking, shall not be created by special act, but may be formed under general law."[6] - - - - "No corporation shall be created by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided."[7] - - - - "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void. And, as soon as practicable after the adoption of this constitution, it shall be the duty of the governor to appoint three persons learned in the law, whose duty it shall be to prepare draughts of general laws, providing for the creation of corporations in such cases as may be proper, and for all other cases where a general law can be made; and for revising and amending, so far as may be necessary or expedient, the general laws which may be in existence on the first day of June, eighteen hundred and sixty-seven, providing for the creation of corporations and for other purposes; and

[1] Ark. Const. of 1874, art. 12, § 6 (in part).

[2] Cal. Const. of 1879, art. 12, § 1 (in part).

[3] Ala. Const. of 1875, art. 13, § 1.

[4] Del. Const. of 1831, art. 2, Addendum of § 17.

[5] Florida Const. of 1868, art. 5, § 22.

[6] Ind. Const. of 1851, art. 11, § 13.

[7] Ia. Const. of 1857, art. 8, § 1.

such draughts of laws shall, by said commissioners, be submitted to the general assembly at its first meeting for its action thereon."[1] - - - - "Corporations shall be formed under general laws, and shall not be created by special acts of the legislature except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained; and, however formed, they shall forever be subject to the general laws of the State."[2] - - - - "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed. But the legislature may, by a vote of two-thirds of the members elected to each house, create a single bank with branches."[3] - - - - "No corporation shall be formed under special acts except for municipal purposes."[4] - - - - "No corporations shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the State; but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time or repealed."[5] - - - - "The legislature shall pass no special act in any manner relating to corporated powers, except for municipal purposes; but corporations may be formed under general laws, and all such laws may, from time to time, be altered or repealed."[6] - - - - "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say: . . . Granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever. Granting to any corporation, association, or individual the right to lay down railroad tracks. . . . The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the legislature."[7] - - - - "The legislature shall not pass a private or local bill in any of the following cases: . . . Granting to any corporation, association, or individual the right to lay down railroad tracks. Granting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever. Providing

[1] Md. Const. of 1867, art. 3, § 48.

[2] Me. Const. of 1820, art. 4, § 14, amend. 1876.

[3] Mich. Const. of 1850, art. 15, § 1, amend. 1862.

[4] Minn. Const. of 1857, art. 10, § 2.

[5] Neb. Const. of 1875, art. 11, § 1.

[6] Nev. Const. of 1864, art. 8, § 1.

[7] N. J. Const. Amend. of 1875, art. 4, § 7.

for building bridges, and chartering companies for such purposes, except on the Hudson river below Waterford, and on the East river, or over the waters forming a part of the boundaries of the State. The legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which, in its judgment, may be provided for by general laws."[1] - - - - "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the object of the corporations cannot be attained under general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed."[2] - - - - "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."[3] - - - - "Corporations may be formed under general laws, but all such laws may from time to time be altered or repealed."[4] - - - - "No corporation shall be created, or its powers increased or diminished, by special laws; but the general assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed; and no such alteration or repeal shall interfere with or divest rights which have become vested."[5] - - - - "The legislature shall not, except as otherwise provided in this constitution, pass any local or special law, . . . For incorporating railroads or other works of internal improvement."[6] - - - - "No private corporation shall be created except by general laws."[7] - - - - "General laws shall be enacted providing for the creation of private corporations, and shall therein provide fully for the adequate protection of the public and of the individual stockholders."[8] - - - - "The legislature shall provide for the organization of all corporations hereafter to be created by general laws, uniform as to the class to which they relate; but no corporation shall be created by special law: Provided, That nothing in this section contained shall prevent the legislature from providing by special laws for the connection by canal of the waters of the Chesapeake with the Ohio river, by line of the James river, Greenbrier, New River, and

[1] N. Y. Const. Amend. of 1874, art. 2, § 18 (in part).

[2] N. C. Const. Amend. of 1876, art. 8, § 1.

[3] Oregon Const. of 1857, art. 11, § 2.

[4] S. C. Const. of 1868, art. 12, § 1.

[5] Tenn. Const. of 1870, art. 11, § 8.

[6] Texas Const. of 1876, art. 3, § 56.

[7] Texas Const. of 1876, art. 12, § 1.

[8] Tex. Const. of 1876, art. 12, § 2.

Great Kanawha."[1] - - - - "Corporations, without banking powers or privileges, may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."[2] - - - - "The legislature is prohibited from enacting any special or private laws in the following cases: For granting corporate powers or privileges, except to cities."[3]

§ **541. And Subject to Legislative Alteration or Repeal.** — "All general laws and special acts passed pursuant to this section may be altered, amended or repealed."[4] - - - - "Corporations may be formed under general laws; which laws may from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke, or annul, any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion, it may be injurious to the citizens of this State; in such manner, however, that no injustice shall be done to the corporators."[5] - - - - "All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."[6] - - - - "Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch, of the general assembly; and no exclusive privileges except as in this article provided, shall ever be granted."[7] - - - - "All charters granted or adopted in pursuance of this section and all charters heretofore granted and created, subject to repeal or modification, may be altered, from time to time, or be repealed. Provided, nothing herein contained shall be construed to extend to banks or the incorporation thereof."[8] - - - - "The legislature may provide by law for altering, revoking or annulling, any charter of incorporation, existing and revocable at the time of the adoption of this constitution, in such

[1] W. Va. Const. of 1872, art. 11, § 1.

[2] Wis. Const. of 1848, art. 11, § 1.

[3] Wis. Const. Amend. of 1871, art. 4, § 31.

[4] Ala. Const. of 1875, art. 13, § 1 (in part).

[5] Ark. Const. of 1874, art. 12, § 6.

[6] Cal. State Const. 1879, art. 12, § 1. Similar provisions exist in the Constitutions of many other States, as seen by the preceding section.

[7] Ia. Const. of 1857, art. 8, § 12.

[8] Md. Const. of 1867, art. 3, § 48.

manner, however, that no injustice shall be done to the corporation."[1] - - - - "No charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the State, but the legislature shall provide by general law for the organization of corporations hereafter to be created: Provided, That any such law shall be subject to future repeal or alteration by the legislature."[2] - - - - "Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this State may, as to such business, be regulated, limited or restrained by law."[3]

§ 542. Legislature not to Extend Charter nor Remit Forfeitures. — "The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing, or which shall hereafter exist under the laws of this State."[4] - - - - "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend such forfeited charter, or pass any other general or special laws for the benefit of such corporations."[5]

§ 543. Except on Condition of Accepting Constitutional Provisions. — "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same or pass any general or special law for the benefit of such corporation, other than in execution of a trust created by law or by contract, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution."[6] - - - - "The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the conditition that such corporation shall thereafter hold its charter subject to the provisions of thls constitution."[7] - - - - "No corporation other than municipal corporations in existence at the time of the adoption of this constitution, shall have the benefit of any future

[1] Const. Idaho, 1889, art. 11, § 3.

[2] Const. Idaho, 1889, art. 11, § 2.

[3] Const. Wash. 1889-90, art. 12, § 1.

[4] Cal. Const. 1879, art. 12, § 7; Const. Wash. 1889-90, art. 12, § 3.

[5] Mo. Const. of 1875, art. 12, § 3.

[6] Ala. Const. of 1875, art. 13, § 3.

[7] Penn. Const. of 1873, art. 16, § 2; Ark. Const. of 1874, art. 17, § 8.

legislation, without first filing in the office of the Secretary of State an acceptance of the provision of this constitution in binding form."[1]

§ 544. Legislature may Alter, Revoke or Annul Existing Charters. — "The general assembly shall have the power to alter, revoke or amend any charter of incorporation now existing, and revocable at the ratification of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators."[2] - - - - "The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators."[3] - - - - "The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever in their opinion it may be injurious to the citizens of this commonwealth; in such manner, however, that no injustice shall be done to the incorporators."[4] - - - - "The legislative assembly shall have the power to alter, revoke or annul any charter of incorporation existing at the time of the adoption of this constitution, or which may be hereafter incorporated, whenever in its opinion it may be injurious to the citizens of the State."[5]

§ 545. No Special Law as to More than One Corporation. — "No law hereafter enacted shall create, renew, or extend the charter of more than one corporation."[6] - - - - "No law hereafter enacted shall create, renew or extend the charter of more than one corporation."[7]

§ 546. Existing Charters Annulled where no Organization has Taken Place. — "All existing charters or grants of special or exclusive privileges, under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter have no validity."[8] - - - - "All existing charters or grants of special or ex-

[1] Const. Idaho, 1889, art. 11, § 7.

[2] Ala. Const. of 1875, art. 13, § 10 (in part).

[3] Col. Const. of 1876, art. 15, § 3.

[4] Penn. Const. of 1873, art. 16, § 10.

[5] Const. Montana, 1889, art. 15, § 3.

[6] Ala. Const. of 1875, art. 13, § 10.

[7] Penn. Const. of 1873, Art. 16, § 10.

[8] Ark. Const. of 1874, art. 12, § 1;

clusive privileges, under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever."[1] - - - - "All existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not be in operation within sixty days from the time this constitution takes effect, shall thereafter have no validity or effect whatever."[2] - - - - "All existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not have been in operation within two years from the time this constitution takes effect, shall thereafter have no validity or effect whatever: provided, that nothing herein shall prevent the execution of any *bona fide* contract heretofore lawfully made in relation to any existing charter or grant in this State."[3]

§ 547. State Aid not to be Granted. — "Except as herein provided the State shall never become a stockholder in or subscribe to, or be interested in, the stock of any corporation or association."[4] - - - - "The State shall not be a stockholder in any bank after the expiration of the present bank-charter; nor shall the credit of the State ever be given or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association."[5] - - - - "The State shall not become a stockholder in any corporatlon nor shall it assume or pay the debt or liability of any corporation unless incurred in time of war for the benefit of the State."[6] - - - - "The State shall not subscribe to or be interested in the stock of any company, association or corporaion."[7] - - - - "The State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association or corporation."[8] - - - - "No money shall ever be appropriated or drawn from the State treasury for the use or benefit of any corporation, association, asylum, hospital or any other institution not under the exclusive management and control of the State as a State

Penn. Const. of 1873, art. 16, § 1; Mo. Const. of 1875, art. 12, § 1; Colo. Const. of 1876, Art. 15, § 1 (in substance); Ala. Const. of 1875, art. 13, § 2 (with the word "ratification," intead of "adoption"); Const. Idaho, art. 11, § 1 (in substance); Const. Mont. art. 15, § 1 (in substance); Const. Wash., art. 12, § 2 (in substance).

[1] Ill. Const. of 1870, art. 11, § 2.

[2] Neb. Const. of 1875, art. 11, § 6.

[3] W. Va. Const. of 1872, art. 11, § 3.

[4] Ark. Const. of 1874, art. 12, § 7.

[5] Ind. Const. of 1851, art. 11, § 12.

[6] Ia. Const. of 1857, art. 8, § 3.

[7] Mich. Const. of 1850, art. 14, § 8; Oregon Const. of 1857, art. 11, § 6.

[8] Cal. State Const. 1879, art. 12, § 13.

institution, nor shall any grant or donation of property ever be made thereto by the State; provided, that notwithstanding anything contained in this or any other section of this constitution, the legislature shall have the power to grant aid to institutions, conducted for the support and maintenance of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances; such aid to be granted by a uniform rule and proportioned to the number of inmates of such respective institutions; provided further, that the State shall have, at any time, the right to inquire into the management of such institutions; provided further, that whenever any county, or city and county, or city or town shall provide for the support of minor orphans or half orphans, or abandoned children or aged persons in indigent circumstances, such county, city and county, city or town shall be entitled to receive the same *pro rata* appropriations as may be granted to such institutions under church or other control. An accurate statement of the receipts and expenditures of public moneys shall be attached to and published with the laws at every regular session of the legislature." [1] - - - - "No tax shall be levied upon persons for the benefit of any chartered company of the State, or for paying the interest on any bonds issued by said chartered companies, counties, or corporations for the above mentioned purposes, and any laws to the contrary are hereby declared null and void." [2] - - - - "The credit of the State shall not, in any manner, be given or loaned to or in aid of, any individual, association, or corporation; and the State shall never assume or become responsible for the debts or liabilities of any individual, association, or corporation." [3] - - - - "The credit of this commonwealth shall never be given or loaned in aid of any person, association, municipality or corporation." [4] - - - - "The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation." [5] - - - - "The credit of the State shall not be granted to or in aid of any person, association or corporation." [6] - - - - "The credit of the State shall not be pledged or loaned in aid of any person, association, or corporation; nor shall the State hereafter become a stockholder in any corporation or association." [7] - - - - "The general assembly shall have no power to give or to lend, or to authorize the giving or lending of the credit of the State in aid of or to any person, association, or corporation, whether municipal or other, or to pledge the credit of the State in any manner

[1] Cal. Const. 1879, art. 4, § 22.

[2] Florida Const. of 1868, art. 12, § 8.

[3] Ia. Const. of 1857, art. 7, § 1.

[4] Ky. Const. of 1850, art. 2, § 33.

[5] Md. Const. of 1867, art. 3, § 34.

[6] Mich. Const. of 1850, art. 14, § 6.

[7] Miss. Const. of 1868, art. 12, § 5.

whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever." [1] - - - - "The general assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity." [2] - - - - "The general assembly shall have no power hereafter to subscribe or authorize the subscription of stock on behalf of the State, in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the State." [3] - - - - "The State shall not donate or loan money or its credit, subscribe to or be interested in the stock of any company, association, or corporation, except corporations formed for educational or charitable purposes." [4] - - - - "And the general assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon." [5] - - - - "Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation, or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents as to it may seem proper; nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes." [6] - - - - "The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation whatever; nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever." [7] - - - - "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational. or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association." [8] - - - - "The credit of

[1] Mo. Const. of 1875, art. 4, § 45.

[2] Mo. Const. of 1875, art. 4, § 46.

[3] Mo. Const. of 1875, art. 4, § 49.

[4] Nev. Const. of 1864, art. 8, § 9.

[5] N. C. Const. Amend. of 1876, art. 5, § 4.

[6] N. Y. Const. Amend. of 1874, art. 8, § 10.

[7] Ohio Const. of 1851, art. 8, § 4.

[8] Penn. Const. of 1873, art. 3, § 18.

the commonwealth shall not be pledged or loaned to any individual, company, corporation, or association, nor shall the commonwealth become a joint owner or stockholder in any company, association, or corporation."[1] - - - - "The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation, or municipality, nor shall the State become the owner, in whole or in part, of any bank, or a stockholder with others in any association, company, corporation or municipality."[2] - - - - "No bonds of the State shall be issued to any railroad company which at the time of its application for the same shall be in default in paying the interest upon the State bonds previously loaned to it, or that shall hereafter and before such application sell or absolutely dispose of any State bonds loaned to it for less than par."[3] - - - - "The legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association, or corporation, whether municipal or other; or to pledge the credit of the State in any manner whatsoever for the payment of the liabilities, present or prospective, of any indivdual, association of individuals, municipal or other corporation whatsoever."[4] - - - - "The legislature shall have no power to make any grant, or authorize the making of any grant, of public money to any individual, association of individuals, municipal or other corporation whatsoever; provided, that this shall not be so construed as to prevent the grant of aid in case of public calamity."[5] - - - - "The credit of the State shall not be granted to or in aid of any county, city, township, corporation, or person; nor shall the State ever assume or become responsible for the debts or liabilities of any county, city, town, township, corporation, or person; nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever."[6] - - - - "The credit of the State shall not be granted to, or in aid of, any person, association, or corporation."[7] - - - - "The State shall not subscribe to or become interested in the stock of any company, association, or corporation."[8] - - - - "The credit of the State shall never be given or loaned in aid of any individual, association, or corporation."[9] - - - - "The credit of the State shall not, in any manner, be given, or loaned to or in aid of any individual, association, municipality or corporation; nor shall the State, directly or

[1] Penn. Const. of 1873, art. 9, § 6.
[2] Tenn. Const. of 1870, art 2, § 31.
[3] Tenn. Const. of 1870, art. 2, § 33.
[4] Tex. Const. of 1876, art. 3, § 50.
[5] Tex. Const. of 1876, art. 3, § 51.
[6] W. Va. Const. of 1872, art. 10, § 6.
[7] Va. Const. of 1870, art. 10, § 12.
[8] Va. Const. of 1870, art. 10, § 14.
[9] Wis. Const. of 1848, art. 7, § 3.

indirectly, become a stockholder in any association or corporation."[1] - - - - "The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, company or corporation."[2] - - - - "The State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association or corporation."[3]

§ 548. Nor Debts to State, nor State's Lien, Released or Commuted.— "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this State or to any municipal corporation therein."[4] - - - - "The general assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any municipal corporation therein."[5] - - - - "Except as herein otherwise provided, the State shall never assume or pay the debt, or liability of any county, town, city or other corporation whatever, or any part thereof, unless such debt or liability shall have been created to repel invasion, suppress insurrection, or to provide for the public welfare and defense. Nor shall the indebtedness of any corporation to the State ever be released or in any manner discharged, save by payment into the public treasury."[6] - - - - "The general assembly shall have no power to release or alienate the lien held by the State upon any railroad, or in any wise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired."[7] - - - - "The general assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this State, or to any county or other municipal corporation therein."[8] - - - - "The legislature shall have no power to release or alienate any lien held by the State upon any railroad, or in any wise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired."[9] - - - - "The liability to the State of any incorporated company or institution to redeem the principal and pay the interest of any loan heretofore made by the State to such company or

[1] Const. Idaho, 1889, art. 8, § 2.

[2] Const. Wash. 1889–90, art. 8, § 5.

[3] Const. Wash. 1889–90, art. 12, § 9.

[4] Cal. State Const. 1879, art. 4, § 25, div. 16.

[5] Ill. Const. of 1870, art. 4, § 23.

[6] Ark. Const. of 1874, art. 12, § 12.

[7] Mo. Const. of 1875, art. 4, § 50.

[8] Mo. Const. of 1875, art. 4, § 51.

[9] Tex. Const. of 1876, art. 3, § 54.

institution shall not be released or commuted." [1] - - - - "The legislature shall not pass *local* or *special* laws in any of the following enumerated cases, that is to say: . . . Releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any person or corporation in this State, or any municipal corporation therein." [2] - - - - "No obligation or liability of any person, association or corporation, held or owned by the State, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released or postponed, or in any way diminished by the legislative assembly; nor shall such liability or obligation be extinguished, except by the payment thereof into the proper treasury." [3]

§ **549. Nor Municipal Aid Granted.**— "No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual." [4] - - - - "No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly." [5] - - - - "The general assembly shall have no power to authorize any county, city, town, or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever, or to become a stockholder in such corporation, association, or company." [6] - - - - "No city, county, town, precinct, municipality, or other subdivision of the State shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein, of any railroad or private corporation, or association." [7] - - - - "No county, city, borough, town, township, or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation or become security for or be directly or indirectly the owner of any stock or bonds of any association or corporation." [8] - - - - "The general court shall not authorize any town to loan or give its money or credit, directly or indirectly, for the benefit of any corporation having for its object a dividend of profits, or in any way aid the same by taking its stock or bonds." [9] - - - - "The general assembly shall never authorize any county, city, town or

[1] Va. Const. of 1870, art. 10, § 21.

[2] Const. Idaho, 1889, art. 3, § 19.

[3] Const. Montana, 1889, art. 5, § 39.

[4] Ark. Const. of 1874, art. 12, § 5.

[5] Ia. Const. of 1858, art. 8, § 4.

[6] Mo. Const. of 1875, art. 4, § 47.

[7] Neb. Const. of 1875, art. 11, § 1.

[8] N. J. Const. Amend. of 1875, art. 1, par. 19.

[9] N. H. Const. Amend. of 1877, part 2, § 5, proviso.

township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever; or to raise money for, or loan its credit to or in aid of, any such company, corporation, or association."[1] - - - - - "No county, city, town, or other municipal corporation, by vote of its citizens or otherwise, shall become a stockholder in any joint stock company, corporation, or association whatever, or raise money for or loan its credit to or in aid of any such company, corporation, or association."[2] - - - - "The general assembly shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution, or individual."[3] - - - - "The legislature shall have no power to authorize any county, city, town or other political corporation, or subdivision of the State, to lend its credit or to grant public money or thing of value, in aid of or to any individual, association, or corporation whatsoever; or to become a stockholder in such corporation, association or company."[4] - - - - "No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation, to the same, or in any wise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law."[5] - - - - "No county, city, town, township, board of education, or school district, or other subdivision, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this State."[6]

§ 550. Except upon Certain Conditions. — "No law shall be passed by which a citizen shall be compelled against his consent, directly or indirectly, to become a stockholder in, or contribute to, any railroad or work of public improvement, except in the case of the inhabitants of a corporate town or city. In such cases, the general assembly may permit the corporate authorities to take such stock, or make such contribution, or engage in such work, after a majority of the qualified voters of such town or city, voting at an election held for

[1] Ohio Const. of 1851, art. 8, § 6.

[2] Oregon Const. of 1857, art. 11, § 9.

[3] Penn. Const. of 1873, art. 9, § 7.

[4] Tex. Const. of 1876, art. 3, § 52.

[5] Tex. Const. of 1876, art. 11, § 3.

[6] Const. Idaho, 1889, art. 8, § 4.

the purpose, shall have voted in favor of the same; but not otherwise."[1] - - - - "No county of this State shall contract any debt or obligation, in the construction of any railroad, canal or other work of internal improvement, nor give or loan its credit to or in aid of any association or corporation, unless authorized by an act of the general assembly, which shall be published for two months before the next election for members of the house of delegates, in the newspapers published in such county, and shall also be approved by a majority of all the members elected to each house of the general assembly, at its next session after said election."[2] - - - - "The legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto."[3] - - - - "No county, city, town or other municipal corporation shall become a stockholder in any joint-stock company, corporation, or association whatever, or loan its credit in aid of any such company, corporation, or association, except railroad corporations, companies, or associations."[4] - - - - "But the credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association, or corporation, except upon an election to be first held by the qualified voters of such county, city, or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association, or corporation, except upon a like election and the assent of a like majority. But the counties of Grainger, Hawkins, Hancock, Union, Campbell, Scott, Morgan, Grundy, Sumner, Smith, Fentress, Van Buren, White, Putnam, Overtown, Jackson, Cumberland, Anderson, Henderson, Wayne, Marshall, Cocke, Coffee, Macon, and the new county herein authorized to be established out of fractions of Sumner, Macon, and Smith counties, and Roane, shall be excepted out of the provisions of this section, so far that the assent of a majority of the qualified voters of either of said counties voting on the question shall be sufficient, when the credit of such county is given or loaned to any person, association, or corporation: Provided, That the exception of the counties above named shall not be in force beyond the year one thousand eight hundred and eighty, and after that period they shall be subject to the three-fourths majority applicable to the other counties of the State."[5] - - - - "The legislative assembly shall have no power to

[1] Ga. Const. of 1868, art. 3, § 6, No. 4.

[2] Md. Const of 1867, art. 3, § 54.

[3] Miss. Const. of 1868, art. 12, § 14.

[4] Nev. Const. of 1864, art. 8, § 10.

[5] Tenn. Const. of 1870, art. 2, § 29.

pass any law authorizing the State, or any county in the State, to contract any debt or obligation in the construction of any railroad, nor give or loan its credit to or in aid of the construction of the same." [1]

§ 551. Neither State nor Municipal Aid to be Granted. — "The legislature shall have no power to give or to lend or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing or that may be hereafter established in aid of or to any person, association or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever for the payment of the liabilities of any individual, association municipal or other corporation, whatever; nor shall it have power to make any gift, or authorize the making of any gift of any public money or thing of value to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the legislature granting aid pursuant to section twenty-two of this article; and it shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever." [2] - - - - "The legislature shall have power to provide for issuing State bonds bearing interest for securing the debt of State, for the erection of State buildings, and for the support of State institutions, but the credit of the State shall not be pledged or loaned to any individual company, corporation, or association; nor shall the State become a joint owner or stockholder in any company, association, or corporation. The legislature shall not authorize any county, city, borough, township, or incorporated district to become a stockholder in any company, association, or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual." [3] - - - - "No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association, or corporation whatever." [4] - - - - "No county shall subscribe for stock in any incorporated company, unless the same be paid for at the time of such subscription; nor shall any county loan its credit to any incorporated company, nor borrow money for the purpose of taking stock in any such company, nor shall the general assembly ever, on behalf of the State, assume the debts of any county, city, town, or township, nor of any corporation whatever." [5]

[1] Const. Montana, 1889, art. 5, § 38.

[2] Cal. State Const. 1879, art. 4, § 31.

[3] Florida Const. of 1868, art. 3, Add. § 7.

[4] N. J. Const. Amend. of 1875, art. 1, par. 20.

[5] Ind. Const. of 1851, art. 10, § 6.

§ 552. Provisions of Minnesota Constitution as to State Aid: "Minnesota Railroad Bonds." — "The credit of the State shall never be given or loaned in aid of any individual, association, or corporation."[1] - - - - Subsequently this section was so altered and amended as to read: "The credit of this State shall never be given or loaned in aid of any individual, association, or corporation, except that for the purpose of expediting the construction of the lines of railroads, in aid of which the Congress of the United States has granted lands to the territory of Minnesota, the governor shall cause to be issued and delivered to each of the companies in which said grants are vested by the legislative assembly of Minnesota the special bonds of the State, bearing an interest of 7 per cent. per annum, payable semi-annually in the city of New York, as a loan of public credit, to an amount not exceeding twelve hundred and fifty thousand dollars; or an aggregate amount to all of said companies not exceeding five millions of dollars, in manner following, to wit: whenever either of the said companies shall produce to the governor satisfactory evidence, verified by the affidavits of the chief engineer, treasurer, and two directors of said company, that any ten miles of the road of said company has been actually constructed and completed ready for placing the superstructure thereon, the governor shall cause to be issued and delivered to such company bonds to the amount of one hundred thousand dollars, and whenever thereafter, and as often as either of said companies shall produce to the governor like evidence of a further construction of ten miles of its road as aforesaid, then the governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars for each and every ten miles of road thus constructed; and whenever such company shall furnish like evidence that any ten miles of its road is actually completed and cars running thereon, the governor shall cause to be issued to such company like bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the governor like evidence that any further ten miles of said road is in operation as aforesaid, the governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars, until the full amount of the bonds hereby authorized shall be issued; Provided, that two-fifths and no more of all bonds issued to the Southern Minnesota Railroad Company shall be expended in the construction and equipment of the line of road from La Crescent to the point of junction with the Transit road, as provided by law: And further provided, that the Minneapolis and Cedar Valley Railroad Company shall commence the construction of their road

[1] Minn. Const. of 1857, art. 9, § 10.

at Faribault and Minneapolis, and shall grade an equal number of miles from each of said places. The said bonds thus issued shall be denominated 'Minnesota State Railroad bonds,' and the faith and credit of this State are hereby pledged for the payment of the interest and the redemption of the principal thereof. They shall be signed by the governor, countersigned and registered by the treasurer, and sealed with the seal of the State, of denominations not exceeding one thousand dollars, payable to the order of the company to whom issued, transferable by the indorsement of the president of the said company, and redeemable at any time after ten and before the expiration of twenty-five years from the date thereof. Within thirty days after the governor shall proclaim that the people have voted for a loan of State credit to railroads, any of said companies proposing to avail themselves of the loan herein provided for, and to accept the conditions of the same, shall notify the governor thereof, and shall within sixty days commence the construction of their roads, and shall within two years thereafter construct, ready for the superstructure, at least fifty miles of their road. Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company and for the punctual payment of the interest which shall accrue thereon in such manner as to exonerate the treasury of the State from any advances of money for that purpose; and, as security therefor, the governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior encumbrances, which such company is or may be authorized to sell in trust for the better security of the treasury of the State from loss on said bonds, which said deed of trust shall authorize the governor and Secretary of State to make conveyances of title to all or any of such lands to purchasers agreeing with their respective railroad companies therefor; Provided, That before releasing the interest of the State to such lands, such sale shall be approved by the governor; but the proceeds of all such sales shall be applied to the payment of interest accruing upon the bonds in case of default of the payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due; and as further security, an amount of first-mortgage bonds, on the roads, lands, and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the treasurer of the State at the time of the issue of State bonds, and in case either of said companies shall make default in payment of either the interest or principal of the bonds issued to said companies by the governor, no more State bonds shall thereafter

be issued to said company; and the governor shall proceed in such manner as may be prescribed by law to sell the bonds of the defaulting company or companies, or the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same: Provided, That if any company so in default, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the Stte, no sale shall take place, and the right of such company shall not be impaired to a further loan of State credit; Provided, If any of said companies shall at any time offer to pay the principal, together with the interest that may then be due upon any of the Minnesota State Railroad bonds, which may have been issued under the provisions of this section, then the Treasurer of State shall receive the same, and the liability of said company or companies, in respect to said bonds, shall cease upon such payment into the State treasury, of principal, together with the interest as aforesaid: Provided further, That in consideration of the loan of State credit herein provided, that the company or companies which may accept the bonds of the State in the manner herein specified shall, as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of its road before the year 1866, and if any failure on the part of any such company to complete the number of miles of its road or roads, in the manner and within the several times herein prescribed, shall forfeit to the State all rights, title, and interest of any kind whatsoever in and to any lands, together with the franchises connected with the same not pertaining or applicable to the portion of the road by them constructed, and a fee-simple to which has not accrued to either of said companies, by reason of such construction, which was granted to the company or companies, thus failing to comply with the provisions hereof, by act of the legislature of the Territory of Minnesota, vesting said land in said companies respectively."[1] - - - - By an amendment ratified in 1860, this section was so altered and amended as to read: "The credit of the State shall never be given or loaned in aid of any individual, association or corporation. Nor shall there be any further issue of bonds denominated 'Minnesota Railroad bonds,' under what purports to be an amendment to section ten of article nine of the constitution adopted on the fifteenth of April, eighteen hundred and fifty-eight, which is hereby expunged from the constitution, excepting and reserving to the State, nevertheless, all rights, remedies, and forfeitures accruing under

[1] Minn. Const. Amendment of 1858, art. 9, § 10.

said amendment."[1] - - - - The following amendment was ratified in 1871: "Any law providing for the repeal or amendment of any law or laws heretofore or hereafter enacted, which provides that any railroad company now existing in this State, or operating its roads therein, or which may be hereafter organized, shall, in lieu of all other taxes or assessments upon their real estate, roads, rolling stock, and other personal property, at and during the time and periods therein specified, pay into the treasury of this State a certain percentage therein mentioned of the gross earnings of such railroad companies now existing or hereafter organized, shall, before the same shall take effect or be in force, be submitted to a vote of the people of this State, and be adopted and ratified by a majority of the electors of the State voting at the election at which the same shall be submitted to them."[2] - - - - The following was ratified in 1872: "The legislature shall not authorize any county, township, city, or other municipal corporation to issue bonds or to become indebted in any manner to aid in the construction or equipment of any or all railroads to any amount that shall exceed ten per centum of the value of the taxable property within such county, township, city, or other municipal corporation; the amount of such taxable property to be ascertained and determined by the last assessment of said property made for the purpose of State and county taxation previous to the incurring of such indebtedness."[3]

§ 553. Private Corporations not to have Municipal or Taxing Powers. — "No power to levy taxes shall be delegated to individuals or private corporations."[4] - - - - "The legislature shall not delegate to any special commission, private corporation, company, association or individual, any power to make, control, appropriate, supervise or in any way interfere with, any county, city, town or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."[5] - - - - "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever."[6]

[1] Minn. Const. Amendment of 1860, art. 9, § 10.

[2] Minn. Const. Amendment of 1871, art. 4, § 32 [a].

[3] Minn. Const. Amend. of 1872, art. 9, § 15.

[4] Ala. Const. of 1875, art. 10, § 2.

[5] Cal. State Const. 1879, art. 11, § 13.

[6] Penn. Const. of 1873, art. 3, § 20; Const. Montana, 1889, art. 5, § 36 (with slight verbal variations).

§ 554. Laws Permitting Alienation of Corporate Franchises Prohibited. — "The legislature shall not pass any laws permitting the leasing or alienation of any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise, or any of its privileges." [1] - - - - "No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder from the liabilities of the lessor, or grantor, lessee, or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges." [2]

§ 555. Corporations not to Employ Chinese Labor. — "No corporation now existing or hereafter formed under the laws of this State, shall, after the adoption of this constitution, employ, directly or indirectly in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision." [3]

§ 556. Existing Rights Saved.—"The rights and duties of all corporations shall remain as if this constitution had not been adopted; with the exception of such regulations and restrictions as are contained in this constitution." [4] - - - - "Corporations created by or under the laws of the Territory of Nevada shall be subject to the provisions of such laws until the legislature shall pass laws regulating the same, in pursuance of the provision of this constitution." [5] - - - - "Nothing in this article shall be construed to divest or affect rights guaranteed by any existing grant or statute of this State or of the Republic of Texas." [6]

§ 557. Retrospective Laws for Benefit of Corporations Prohibited.— "The general assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the State a new liability in respect to transactions or considerations already past." [7]

§ 558. Two-thirds Legislative Vote Required.— "No act of incorporation, except for the renewal of existing corporations, shall be

[1] Cal. State Const. 1879, art. 12, § 10; Const. Montana, 1889, art. 15, § 17; Const. Idaho, 1889, art. 11, § 15.

[2] Const. Wash. 1889–90, art. 12, § 8.

[3] Cal. State. Const. 1879, art. 19, § 2.

[4] Conn. Const. of 1818, art. 10, § 3.

[5] Nev. Const. of 1864, art. 8, § 4.

[6] Tex. Const. of 1876, art. 12, § 7.

[7] Col. Const. of 1876, art. 15, § 12; Mo. Const. of 1875, art. 12, § 19; Const. Montana, 1889, art. 15, § 13.

hereafter enacted without the concurrence of two-thirds of each branch of the legislature, and with a reserved power of revocation by the legislature."[1] - - - - "The legislature shall pass no law altering or amending any act of incorporation heretofore granted without the assent of two-thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations."[2] - - - - "No vote, resolution, law or order, shall pass, granting a donation, or gratuity, in favor of any person, except by the concurrence of two-thirds of each branch of the general assembly, nor by any vote, to a sectarian corporation or association."[3]

§ 559. Duration of Corporations Limited.—"No act of incorporation which may be hereafter enacted shall continue in force for a longer period than twenty years, without the re-enactment of the legislature, unless it be an incorporation for public improvement."[4] - - - - "No corporation, except for municipal purposes, or for the construction of railroads, plank roads and canals, shall be created for a longer time than thirty years."[5]

§ 560. Power of Creating Corporations devolved on the Courts.—"The general assembly shall have no power to grant corporate powers and privileges to private companies, except to banking, insurance, railroad, canal, navigation, mining, express, lumber, manufacturing, and telegraph companies; nor to make, or change, election precincts; nor to establish bridges or ferries; nor to change names of legitimate children; but it shall prescribe, by law, the manner in which such powers shall be exercised by the courts. But no charter for any bank shall be granted or extended, and no act passed authorizing the suspension of specie payments by any bank, except by a vote of two-thirds of the general assembly. The general assembly shall pass no law making the State a stockholder in any corporate company; nor shall the credit of the State be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State, prior to any other debt or lien, except to laborers; nor to any company in which there is not already an equal amount invested by private persons; nor for any other object than a work of public improvement."[6]

[1] Del. Const. of 1831, art. 2, § 17.
[2] Mich. Const. of 1850, art. 15, § 8.
[3] Ga. Const. of 1868, art. 3, § 6, No. 2.
[4] Del. Const. of 1831, art. 2, § 17.
[5] Mich. Const. of 1850, art. 15, § 10. See Attorney-General *v.* Perkins, 73 Mich. 303; *s. c.* 41 N. W. Rep. 426.
[6] Ga. Const. of 1868, art. 3, § 6, No. 5.

§ 561. Saving Rights Arising during the Civil War.— "All rights, privileges, and immunities which may have vested in or accrued to any person or persons, or corporation, in his, her, or their own right, or in any fiduciary capacity, under any act of any legislative body sitting in this State as such, or of any decree, judgment, or order of any court, sitting in this State under the laws then of force and operation therein, and recognized by the people as a court of competent jurisdiction, since the 19th day of January, 1861, shall be held inviolate by all courts of this State unless attacked for fraud, or unless otherwise declared invalid by, or according to, this constitution." [1]

§ 562. Provisions as to Religious Corporations.— "The title to all property of religious corporations shall vest in trustees, whose election shall be by the members of such corporations." [2] - - - - "The general assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law." [3] - - - - "No charter of incorporation shall be granted to any church or religious denomination. Provision may be made by general laws for securing the title to church property and for the sale and transfer thereof, so that it shall be held, used, or transferred for the purposes of such church or religious denomination." [4]

§ 563. Police Power over Corporations not to be Abridged.— "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the State." [5]

§ 564. Bills Creating Corporations Continued till next Session of Legislature. — "Hereafter, when any bill shall be presented to either house of the general assembly to create a corporation, for any other than for religious, literary, or charitable purposes, or for a military or fire company, it shall be continued until another election of members of the general assembly shall have taken place, and such public notice of the pendency thereof shall be given as may be required by law." [6]

§ 565. Laws to be Passed Protecting Laborers. — "The legislature shall, at its first session, pass laws to protect laborers on

[1] Ga. Const. of 1868, art. 11, No. 5.
[2] Kan. Const. of 1859, art. 12, § 3.
[3] Va. Const. of 1870, art. 5, § 17.
[4] W. Va. Const. of 1872, art. 6, § 47.
[5] Mo. Const. of 1875, art. 12, § 5.
[6] R. I. Const. of 1842, art. 4, § 17.

public buildings, streets, roads, railroads, canals, and other similar public works against the failure of contractors and sub-contractors to pay their current wages when due, and to make the corporation, company, or individual for whose benefit the work is done responsible for their ultimate payment."[1]

§ 566. Bonus to be Paid to the State. — "No corporation, company, or association, other than those formed for benevolent, religious, scientific, or educational purposes, shall be created or organized under the laws of this State, unless the persons named as corporators shall, at or before the filing of the articles of association or incorporation, pay into the State treasury fifty dollars, for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock. And no such corporation, company, or association shall increase its capital stock without first paying into the treasury five dollars for every ten thousand dollars of increase: Provided, That nothing contained in this section shall be construed to prohibit the general assembly from levying a further tax on the franchises of such corporation."[2]

§ 567. Meaning of the Word "Corporation" as Used in American Constitutions. — "The term 'corporation,' as used in this article, shall be construed to include all joint-stock companies, or any associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."[3] - - - - "The term 'corporation' as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships,"[4] "except such as embrace banking privileges."[5] "The term 'corporation,' as used in this article shall be held and construed to include all associations and joint-stock companies, having or exercising any of the powers or privileges of corporations not possessed by individuals or partnerships; and all corporations shall have the right to sue, and shall be subject to be sued in all courts in like cases as natural persons, subject to such regulations and conditions as may be prescribed by law."[6]

[1] Tex. Const. of 1876, art. 61, § 35.

[2] Mo. Const. of 1875, art. 10, § 21.

[3] Ala. Const. of 1875, art. 13, § 13; Mo. Const. of 1875, art. 12, § 11 (in substance); N. C. Const. of 1876, art. 8, § 3; Penn. Const. 1873; art. 16, § 13; Idaho Const. 1889, art. 11, § 16.

[4] Cal. Const. of 1879, art. 12, § 4; Kan. Const. of 1859, art. 12, § 6 (in substance); Mich. Const. of 1850, art. 15, § 11 (in substance).

[5] Minn. Const. of 1857, art. 10, § 1.

[6] Const. Montana, 1889, art. 15, § 18; Const. Wash. 1889–90, art. 12, § 5 (in substance).

§ 568. Not to Authorize Investment of Trust Funds in Private Corporate Securities. — "No act of the legislative assembly shall authorize the investment of trust funds by executors, administrators, guardians or trustees in the bonds or stock of any private corporation."[1]

ARTICLE II. RESTRAINTS UPON THE PASSAGE OF SPECIAL STATUTES CONFERRING CORPORATE PRIVILEGES.

[1] Const. Montana, 1889, art. 5, § 37.

§ 573. Restraints upon the Passage of Special Acts Conferring Corporate Powers. — As already seen,[1] the constitutions of many of the States prohibit the legislature from passing *special* acts creating corporations, conferring corporate powers, extending corporate charters, or remitting forfeitures thereof. These constitutional provisions will now be considered.

§ 574. Object of such Constitutional Provisions. — These constitutional provisions were generally established for the purpose of correcting existing evils of a flagrant character. Their purpose was "to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power; of making such laws applicable to all parts of the State, and thereby securing the vigilance and attention of its whole representation; and, finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class."[2]

§ 575. Such Provisions not Retroactive. — Such constitutional provisions are not regarded as retroactive, unless they are declared so in express terms; and if by their terms retroactive, they would be invalid.[3] They do not operate to vacate charters already granted by special acts, where those charters have been accepted and acted upon, as by organizing the corporation under them.[4] If, prior to the adoption of a constitution containing such a prohibition, the legislature creates by a special act a corporation, *e.g.*, a railroad company, and the company in good faith enters upon the construction of its road before the

[1] *Ante*, § 539, *et seq.*

[2] Atkinson *v.* Marietta &c. R. Co., 15 Oh. St. 21, 35; quoted with approval in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, 518. See also Van Riper *v.* Parsons, 40 N. J. L. 1.

[3] *Ante*, § 66; *post*, Ch. 117.

[4] State *v.* Stormont, 24 Kan. 686. Compare Atchison *v.* Bartholow, 4 Kan. 124; State *v.* Young, 3 Kan. 445; State *v.* Hitchcock, 1 Kan. 178; Slack *v.* Maysville &c. R. Co., 13 B. Monr. (Ky.) 1, 17; State *v.* Illinois Central R. Co., 33 Fed. Rep. 730; Covington *v.* East St. Louis, 78 Ill. 548. Section 1 of article 1 of the Illinois constitution of 1870 was not designed to *repeal the general law* on the subject of private corporations in force prior to the adoption of the constitution, and all corporations framed under such law after the adoption of the constitution were held formal and effectual. Meeker *v.* Chicago Cast Steel Co., 84 Ill. 276.

adoption of the constitutional prohibition, the prohibition will not have the effect of revoking its charter.[1] Moreover, where an act of this nature has been passed prior to the establishment of the constitutional prohibition, the effect of the prohibition will not be to disable the legislature from *amending* the former act, provided the effect of the amendment is to make it less onerous to the inhabitants of the counties affected by it.[2] In like manner if, prior to the establishment of such a constitutional ordinance, the legislature has passed an act clothing the county courts with *power to grant aid* to a railway company, and the power remains unexecuted at the time of the passage of the ordinance, the ordinance will not operate to repeal the statute, or to prevent the execution of the power thereby conferred;[3] for as already seen,[4] such a statute, although in terms a grant of power to the municipal corporation, confers a *right* or *privilege* upon the private corporation; and this, it seems, is in the nature of a contract between the State and the private corporation, which is not subject to subsequent impairment by the State, even in the form of a constitutional ordinance. Indeed, where the States have established new constitutions those instruments frequently provide that laws enacted under the prior constitution shall continue in force under the present constitution until altered or repealed by the legislature; and sometimes they contain such a provision with special reference to acts creating corporations, — for example, the following from the constitution of Indiana, of 1850: "All acts of incorporation for municipal purposes shall continue in force under this constitution, until such time as the general assembly shall, in its discretion, modify or repeal the same."[5] When, therefore, a city had power under the old constitution to subscribe to the stock in chartered companies for making roads and other internal improvements, this power remained unimpaired under the new.[6] On the other hand,

[1] Little Rock &c. R. Co. *v.* Little Rock &c. R. Co., 36 Ark. 663.

[2] *Ibid.* Compare Quincy &c. R. Co. *v.* Morris, 84 Ill. 410.

[3] Slack *v.* Maysville &c. R. Co., 13 B. Monr. (Ky.) 1, 17; State *v.* Trustees of Union Township, 8 Ohio St. 394.

[4] *Ante*, § 366.

[5] Ind. Const. 1850, Schedule Specification, 4. See also Commissioners of New Town Cut *v.* Seabrook, 8 Strobh. (S. C.) 560; Demarest *v.* New New York, 74 N. Y. 161.

[6] Aurora *v.* West, 9 Ind. 74, 85.

as already seen,[1] many of the State constitutions have annulled existing special charters, under which *bona fide* organizations had not taken place at the time of their adoption, or within a stated period thereafter. But these provisions are subject to the same rule of interpretation. Thus, the provisions of the constitution of Illinois of 1870,[2] that no corporation shall be created, or its powers enlarged, by special laws, and that all the existing charters or grants of special or exclusive privileges under which organization shall not have taken place, or which shall not have been in operation within ten days of the time the constitution took effect, should have no validity, — refer only to corporations which were then unorganized, or were not in operation, and do not take away any special or exclusive privileges granted to corporations organized and in actual operation.[3]

§ 576. Accepting Charter after Date of Constitutional Prohibition. — But if a corporation is created by a special law, at a time when there is no constitutional provision in force prohibiting legislatures from passing such acts of incorporation, but the persons named do not accept the charter or organize thereunder, until after the passage of such a constitutional provision, their organization will be regarded as a *naked assumption*, in such a sense as will not prevent a person sued upon a promissory note given for shares of their stock from setting up their want of corporate character as a defense.[4]

§ 577. General Law Perpetuating Privileges Granted by Previous Special Charters. —Where special charters are granted conferring peculiar privileges, at a time when there is no constitutional inhibition against the creation of corporations by special acts, and subsequently such a constitutional inhibition is established, the result will be that the peculiar privileges granted by such special statutes will expire by the terms of limitation therein prescribed. After the establishment of such a constitutional inhibition, it will not be competent for the legislature to enact a

[1] *Ante*, § 546.

[2] Ill. Const. 1870, art. 11, §§ 1, 2.

[3] State *v.* Illinois Cent. R. Co., 33 Fed. Rep. 730.

[4] Gillespie *v.* Ft. Wayne &c. Co., 17 Ind. 243. See also Harriman *v.* Southam, 16 Ind. 190; *ante*, § 505.

general law of such a nature that, by reorganizing under it the corporation so specially chartered, the corporators can perpetuate their peculiar privileges indefinitely. When, therefore, a bridge company was chartered by a special act, there being no constitutional inhibition, for the period of twenty-one years, with the *franchise of taking tolls*, and it attempted to organize under such a general law, enacted after the establishment of such a constitutional inhibition, it was held that it could not, by thus organizing, perpetuate its franchise of taking tolls, but that its bridge thereafter became a public highway, and it would be ousted of the franchise of taking tolls, by an information in the nature of *quo warranto*.[1]

§ **578. Conferring Corporate Privileges on Corporations to be thereafter Created under General Laws.** — A constitutional prohibition against creating corporations by special laws, can not be *evaded* by the passage of a special act conferring corporate privileges upon a body of associates to be thereafter incorporated under a general law. An act which grants to individuals and to their assigns certain powers and privileges, and then provides that the act shall not take effect unless the persons to whom the grant is made shall, within a certain time, organize themselves into a corporation under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed. Such an act is an attempt on the part of the legislature to confer powers and privileges upon a corporation by a special act, in the face of the constitutional prohibition. When such persons organize themselves into a corporation under the general law, the corporation possesses no powers or privileges except such as are conferred by such law.[2]

§ **579. Illustration.** — With such a constitutional inhibition existing, the legislature of California undertook to pass " an act to authorize George H. Ensign and others, owners of the Spring Valley Water Works, to lay down water pipes in the public streets of the city and

[1] State *v.* Lawrence Bridge Co., 22 Kan. 438. The principle of this decision is embodied in some of the constitutions in express terms. *Ante*, § 542.

[2] San Francisco *v.* Spring Valley Water Works, 48 Cal. 493 (overruling California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398). Compare Spring Valley Water Works *v.* San Francisco, 22 Cal. 442; *post*, § 580.

county of San Francisco." The act provided that "the said George H. Ensign and his associates and their assigns shall have the right, and the same is hereby granted to them and their assigns, to lay down distributing iron water pipes in any of the public streets, ways or alleys of the city and county of San Francisco," etc. The eighth section of the act provided: "This act shall not take effect until the parties named in section one shall, within sixty days after its passage, duly organize themselves, in conformity with the existing laws regulating corporations, now in force in this State." It was held that this statute was unconstitutional and void, as being an attempt by indirect methods to confer corporate privileges, by a special law, upon a corporation to be thereafter created. Mr. Chief Justice Rhodes, while agreeing generally with the reasoning of the court, dissented from its conclusion, on the ground that the statute did not involve an attempt to confer *corporate powers* upon the grantees named, but that the powers conferred upon them were such as might be conferred upon a natural person or upon an unincorporated association. In other words, his opinion was that a granting of the mere right to lay down water pipes in the streets of a city, upon certain terms and conditions, did not involve the granting of any corporate powers.[1]

§ 580. Rule in the Federal Courts where a State Constitution has Received Conflicting Interpretations in the State Courts. — This decision of the Supreme Court of California was subsequently *denied* by the Circuit Court of the United States, for the District of California. The Federal courts are *foreign jurisdictions*, in respect of the States, to the extent that they are bound by the interpretation which the State courts put upon their own constitutions and laws, when such interpretation is not in conflict with the constitution of the United States.[2] But to this rule those courts have annexed the qualification that, where the highest court of the State adopts an oscillating and inconsistent construction of its own constitution or statutes in a given particular, the Federal court will not be bound, in successive decisions, to follow the *oscillations of the pendulum*, when to do so will give to the subsequent decisions, altering the construction of the constitution or statute, a *retroactive effect*, so as

[1] San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, 509, 533.

[2] Webster *v.* Cooper, 14 How. (U. S.) 504; Ohio Life Ins. &c. Co. *v.* Debolt, 16 How. (U. S.) 415, 431; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175, 206; Chicago &c. R. Co. *v.* Minnesota, 10 Sup. Ct. Rep. 462.

to allow them to render invalid contracts which were lawful at the time when they were made.[1] "The sound and the true rule is," said Mr. Justice Miller, "that if the contract, when made, was valid by the laws of the State, as then expounded by all the departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law. The same principle applies when there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."[2] Moreover, where the course of decisions of the highest court of a State upon a given question is so oscillating that the Federal court is at liberty to regard the interpretation of the constitution or statute in a given instance as *unsettled by the State tribunal*, it will be at liberty to adopt the view which appears to it most correct. This is well illustrated by a decision of Mr. Justice Sawyer at circuit in an important case already cited. In 1863 the Supreme Court of California construed a provision of the constitution of that State restraining the legislature from creating corporations by special acts except for municipal purposes. That construction remained unquestioned by the courts of that State for *eleven years*, during which time much legislation of a similar character to that in question in the Federal court, and among it that involved in the case in the Federal court, was enacted; and under this legislation important rights had become vested. In 1874 the Supreme Court of California, being differently constituted, overruled the prior decision, three of the six judges who sat in the two cases having taken one view, and three the other. At the time of the decision in the Federal court the Supreme Court was again being reorganized, with seven members, only one of whom had considered the question as a member of the State court of last resort. Under these circumstances Mr.

[1] Ohio Life Ins. &c. Co. *v.* Debolt, 16 How. (U. S.) 432; Rowan *v.* Runnels, 5 How. (U. S.) 134.

[2] Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 206.

Circuit Judge Sawyer held that the construction of the constitution was not settled, within the rule which obliges the Federal courts to follow the construction of the State courts, and consequently that the Federal courts were at liberty to adopt the view which appeared to them correct.[1]

§ 581. **Further of Prohibitions against Special Acts Conferring Corporate Powers.** — The constitutions of some of the States are more explicit, in so far as they guard against any possibility of misconstruction by providing that "the general assembly shall pass no special act conferring corporate powers." [2] It is obvious that this language goes further than to prohibit the creation of corporations by special act. It bars the way to the passage of any such act, conferring upon an existing corporation any powers which in their nature can only be possessed and exercised by corporations. With this prohibition in force, a railway company which, by its charter, did not have the power to *sell its franchise* of being a corporation, *mortgaged its properties*, and these properties were sold under the mortgage; and the purchasers thereafter procured a special act of the legislature, which undertook to give effect to the sale, by authorizing them to reorganize the former corporation, to create a new stock and to elect a new board of directors.[3] It was held that this, in substance and legal effect, was an attempt to create a corporation and to confer corporate powers by a special act, and that it was in conflict with the constitutional prohibition above quoted. The court, speaking through Ranney, J., said: "The defendant's counsel insist that the act does not assume to *confer* corporate powers, but is simply declaratory of the effect of a sale of the road and franchises under the decree; that the object of the act is to remove doubts as to the effect of such a sale, which it does, not by conferring corporate powers, but by declaring that the sale shall *transfer* to the purchasers the powers and capacities

[1] Southern Pacific R. Co. *v.* Orton, 6 Sawy. (U. S.) 157. The court accordingly adopted the view of the Supreme Court of California, as laid down in California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398, and declined to follow that subsequently adopted by the court in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493. As to these decisions see *ante*, §§ 478, 479.

[2] See, for instance, Ohio Const. of 1851, art. 13, § 1; *ante*, § 539.

[3] See § 257, *et seq.*

theretofore *conferred* upon the Cincinnati & Marietta Company, which it *sanctions* as an incident of the sale and purchase, including the right of the purchasers to reorganize, without which the purchase of the franchise would be a barren acquisition in their hands. That the transaction assumed this *form*, there is no doubt; but this does not relieve us from the necessity of inquiring what it was *in substance*. Constitutional provisions would be of little value, if they could be evaded by a mere change of forms. These provisions of the constitution are too explicit to admit of the least doubt, that they were intended to disable the general assembly from either creating corporations, or conferring upon them corporate powers, by *special acts* of legislation." [1]

§ **582. States in which Applicable only to Private Corporations.** — By judicial construction in some States,[2] and by the express language of constitutional provisions in others,[3] restrictions against the passage of special laws creating corporations or conferring corporate powers, apply only to *private*, not to *municipal* corporations. This is the construction of the provision of the present constitution of Pennsylvania, vacating all existing charters under which a valid organization shall not have taken place.[4] On the other hand, a constitutional provision that "the legislature shall pass no special act conferring corporate powers" [5] has been held to apply to municipal as well as to private corporations.[6] But it has been held in Kansas that, while this

[1] Atkinson *v.* Marietta &c. R. Co., 15 Oh. St. 21, 35. Compare Wallace *v.* Loomis, 97 U. S. 146; *s. c.* Myer Fed. Dec., § 20.

[2] State *v.* Newark, 40 N. J. L. 71; Ballentine *v.* Pulaski, 15 Lea (Tenn.), 633.

[3] *Ante*, § 539.

[4] *Ante*, § 546; Lehigh Water Co.'s Appeal, 102 Pa. St. 515.

[5] Kan. Const., art. 12, § 1; Oh. Const., art. 13, § 2.

[6] Atchison *v.* Bartholow, 4 Kan. 124; Wyandotte *v.* Wood, 5 Kan. 603; State *v.* Maloy, 20 Kan. 619; State *v.* Cincinnati, 20 Oh. St. 18. Hence, as observed by Judge Dillon, in summarizing these cases, "An act *specially* amending the charter of a city in respect to making local improvements or assessments [citing Atchison *v.* Bartholow, 4 Kan. 124; Gilmore *v.* Norton, 10 Kan. 491; State *v.* Pugh, 43 Oh. St. 98], or specially extending the limits of a particular city [citing Wyandotte *v.* Wood, 5 Kan. 603; State *v.* Cincinnati, 20 Oh. St. 18], is unconstitutional; and so it seems is an act which authorizes a city by name to issue its scrip for a particular purpose, and to levy taxes to pay it in aid of a single enterprise, — the court inclining to hold such an enactment to be a special act, and one which under-

restriction includes municipal corporations properly so called, it does not embrace *quasi-corporations*, such as school districts, although the latter are declared by statute to be bodies corporate.[1] In New York it has been held that a constitutional provision requiring the *assent of two-thirds* of the general assembly to the passage of any bill creating, continuing, altering or renewing any body politic or corporate,[3] applies to municipal, as well as to private corporations.[2]

§ 583. Prohibition against Incorporating Includes Prohibition against Amending.—A prohibition against incorporating cities and towns except by general laws has been justly held to include a prohibition against amending, by special statutes, acts of incorporation already in existence. "To say that the legislature may not pass a law to incorporate a city, but may to amend an act of incorporation in existence before the adoption of the constitution, or charters formed under the general law, would make this provision of the constitution practically amount to nothing. For if they may amend, they may to the extent of passing an entire new law, except as to one section. Or they may at one session amend half the law, and at the next the other half; and thus the plain and positive prohibition of the fundamental law would be evaded. By such a construction, the evils sought to be remedied would continue, if possible, in a more objectionable form."[4]

§ 584. A Contrary View.—A contrary view was taken of this subject by Mr. Circuit Judge Sawyer, in an elaborate decision in the Circuit Court of the United States for the District of

took to confer corporate powers." Dillon Mun. Corp. (4th ed.), § 46; citing to the last point Commercial National Bank *v.* Iola, 2 Dill. (U. S.) 353.

[1] Beach *v.* Leahy, 11 Kan. 23. See also State *v.* Cincinnati, 20 Oh. St. 18, 37; *contra*, School District *v.* Insurance Co., 103 U. S. 707; *ante*, § 20.

[2] *Post*, § 632.

[3] Purdy *v.* People, 4 Hill (N. Y.), 384; reversing *s. c.* 2 Hill (N. Y.), 31. As to what is an *alteration* within this provision, see Corning *v.* Green, 23 Barb. (N. Y.) 33; Smith *v.* Helmer, 7 Barb. (N. Y) 416; Morris *v.* People, 3 Den. (N. Y.) 381.

[4] Ex parte Pritz, 9 Ia. 30, 33. To the same effect see McGregor *v.* Baylies, 19 Ia. 43; Davis *v.* Woolnough, 9 Ia. 104; Baker *v.* Steamboat Milwaukee, 14 Ia. 214; State *v.* Barbee, 3 Ind. 258.

California, in 1879. He held that the provision of the constitution of California prohibiting the legislature from *creating* corporations by special acts except for municipal purposes, did not extend so far as to render invalid an act passed by the legislature of that State authorizing the Southern Pacific Railroad Company to change the line of its road, to accept a congressional grant of land, and to construct its road as provided in the act of Congress incorporating the Atlantic and Pacific Railroad Company. The syllabus of the case as reported, understood to have been prepared by the learned judge himself, gives as good a summation of his course of reasoning as can be made. He proceeded upon the view that the settled rules of construction of State constitutions is that they are not special grants of powers to legislative bodies, but *general* grants of all legislative power, not actually prohibited or expressly excepted; that the *exception* must be *strictly construed;* in other words, that the construction is *strict* against those who stand on the *exception*, and *liberal* in favor of the government itself. He laid stress upon the established rule of strict construction, applicable to State constitutions, that an act of the legislature should never be declared unconstitutional unless there is a clear repugnance between the statute and the organic law. He took the view that what the legislature authorized the railway company in the particular case to do, was not the conferring of a corporate franchise at all. According to his reasoning, the essence of a corporation consists only of a capacity to have perpetual succession under the special denomination and in an artificial form; to take, hold and grant property; to contract obligations, and to sue and be sued by its corporate name; and a capacity, by its corporate name, to receive and enjoy, in common, grants of privileges and immunities. He reasoned that the right to be a corporation is a distinct, independent franchise, complete within itself, having no necessary connection with other distinct franchises, which are the subjects of legislative grant, and which may, or may not be given to corporations once created, as well as to natural persons, as to the legislature may seem advisable. He proceeded upon the view that corporate powers, strictly speaking, are such as are peculiar to corporations, and essential to their being, and not such powers as are usually, or may be, possessed and enjoyed

indifferently by corporations and natural persons. Referring specially to the meaning of the clause of the constitution of California which prohibits the creation of corporations by special act, he reasoned that the creation of a corporation is the bringing into being of an artificial person having the essential attributes of a corporation — the creation of the distinct and independent franchise called a corporation,— which, when created, has a capacity, among other things, by its corporate name, to receive and enjoy such other franchises, privileges and immunities, property and rights, as the legislature itself, or other persons with its permission, may grant it. He reasoned that the granting of independent franchises, other than the specific franchises constituting a corporation, and of other privileges and powers, to a pre-existing corporation, are not acts creative of a corporation, but acts regulating the conduct of the existing corporation in its relation to and intercourse with the public and other persons, natural and artificial. His conclusion easily followed, that an act of the legislature which merely granted to an existing railroad corporation authority to change the line of its road, is not an act creating a corporation in whole or in part and does not involve the creation of any new corporate power.[1]

§ 585. Restraining Amendments Enlarging Existing Powers and Privileges.— There is no doubt that such a constitutional provision ought to be construed as restraining the power of the legislature to amend existing special charters, in any way, so as to *enlarge the powers* or privileges thereby conferred. It has been held that they do not prohibit the legislature from passing special acts *regulating* existing corporations, in the exercise of the powers already conferred upon them by special laws. This seems to have been the conclusion of the Court of Appeals of New York, in a case involving the rights of an elevated railway company created by a special statute prior to the constitutional amendment which contained the prohibition. The court, speaking through Church, C. J., laid stress on the fact that "no exclusive

[1] Southern Pacific R. Co. *v.* Orton, 6 Sawy. (U. S.) 157. The court declined to follow the decision of the Supreme Court of California in San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, for the reasons already stated. *Ante,* § 480.

right or franchise was granted to the respondent corporation upon any construction of the clause. Every substantial right existed before the passage of the act; and the conditions imposed, embracing changes of structure and manner of occupying streets, should be regarded as restrictive of existing rights, and not grants of rights or franchises within the constitutional sense."[1] Quoting this language, it was said in a subsequent case by Gray, J.: "If the legislative act operates upon a charter in the direction of a *regulation*, an *adjustment*, or a *restriction* of powers possessed, it could not be objectionable. Within its reserved powers the legislature may, at all times, amend or alter the charter; but the constitutional amendment will not permit it, by a private bill, to make any new grant of rights, comprehended within those specified by the amendment."[2] The legislature could not, therefore, by amending the charter of a corporation created with power to transport freight and passengers through a pneumatic tube, which charter had been granted by a special act before the constitutional amendment, empower it to construct an ordinary railway for that purpose, with any motive power which it might see fit to use, not emitting smoke, cinders, etc.[3]

§ 586. General Enabling Acts Applicable to Existing Corporations. — General *enabling acts*, applicable to existing corporations or to all existing corporations of a particular kind, are not unconstitutional, as being within the prohibition against conferring corporate powers by special acts. Thus, an act providing that any *university or college*, organized and incorporated under the provisions of any special charter, etc., may, by a majority of its board of directors, *change its name*, if done before a given date, is valid. It is not a local act, nor does it amend the charter of any particular college or university, or create a new corporation. It operates alike, and uniformly throughout the State upon like facts.[4] The fact that the act *limits the time* within which such institutions of learning may change their names does not affect its validity.[5]

[1] Re Gilbert Elevated R. Co., 70 N. Y. 361.

[2] Astor *v.* Arcade R. Co., 113 N. Y. 93, 114; *s. c.* 20 North East. Rep. 594.

[3] *Ibid.* But see *post*, § 599, p. 450.

[4] Hazelett *v.* Butler University, 84 Ind. 230.

[5] *Ibid.;* citing Clare *v.* State, 68

§ 587. **Distinctions as to What are and What are not Corporate Powers.** — With reference to a constitutional prohibition against creating corporations by special acts, much judicial thought has been expended upon the question what are and what are not to be deemed corporate powers and franchises. It is undeniably logical that where the legislature is prohibited from creating a corporation by a special act, it cannot, without an evasion of the prohibition, confer by special act *essential corporate franchises* on existing corporations, which are organized under previous valid charters or under general laws. It is hence highly important to consider what powers are in the nature of corporate franchises and what are not. It has been reasoned, on very doubtful grounds, that only such powers or faculties are corporate franchises as can be possessed and enjoyed by corporations alone, and that powers or privileges which can be possessed and enjoyed by individuals are not to be deemed corporate franchises, and may be conferred upon existing corporations by a special act of the legislature, notwithstanding the prohibition in question.[1] On the other hand, it has been held that a grant of an *easement in a street*, made by the legislature to a corporation, cannot be sustained as a grant of an interest in the lands, but must be viewed purely as a grant of corporate power, which cannot be made to a private corporation by special act.[2] The reasoning in support of this view is that the State has no proprietary interest in the streets of a city dedicated to public use; and that its power to grant to a private corporation an easement over streets, not common to the public at large, is limited to such power as it possesses in its sovereign capacity to grant a franchise, and not to any proprietary interest in the streets, the fee of the streets in a city being, as a general rule, in the owners of the adjoining land, on each side, to the center of the street.[3] The conclusion therefore is that private corporations to *supply*

Ind. 17. As to distinction taken in the same State between legal and special acts, see Hymes *v.* Aydelott, 26 Ind. 431; State *v.* Reitz, 62 Ind. 159.

[1] See the reasoning of Mr. Circuit Judge Sawyer in Southern Pacific R. Co. *v.* Orton, 6 Sawy. (U. S.) 157; denying the case next cited. See the reasoning of the learned judge more at large, *ante*, § 584.

[2] City of San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

[3] City of San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

a city with water, cannot be created by special act, nor can the power to supply a city with water be conferred on a private corporation by special act; and the fact that the franchise of such a corporation consists chiefly in an easement in city streets, does not exempt them from the constitutional rule.[1]

§ 588. Exception where General Laws can not be Made Applicable.— Some of the constitutions annex to the prohibition against the passage of local or special laws the qualification that they shall not be passed where general laws can be made applicable.[2] Although there is a division of opinion upon the question, the weight of authority is that *the legislature is the exclusive judge* of the question whether a general law can be made applicable in particular circumstances.[3] The view that, to remit the decision of this question exclusively to the discretion of the legislature would deprive such a constitutional prohibition of all its vitality, is founded on the most ordinary

[1] City of San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

[2] *Ante*, § 539. Thus, the constitution of Indiana (Ind. Const. 1850, art. 4, § 22), enumerates a long list of cases in which the general assembly shall not pass local or special laws, and then in the following section provides: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

[3] In *Kansas*, it is held that the legislature is the exclusive judge of the question: State *v.* Hitchcock, 1 Kan. 178; Beach *v.* Leahy, 11 Kan. 23; Harvey *v.* Rush County, 32 Kan. 159; Francis *v.* Atchison &c. R. Co., 19 Kan. 303; Norton County *v.* Shoemaker, 27 Kan. 77; Knowles *v.* Board of Education, 33 Kan. 692, 699. In *Colorado* the same rule prevails. Brown *v.* Denver, 7 Col. 305; Carpenter *v.* People, 8 Col. 116; Darrow *v.* People, *Id.* 426. So in *Nevada:* Evans *v.* Job, 8 Nev. 322. The same rule formerly applied in *Missouri.* State *v.* County Court, 50 Mo. 317; State *v.* County Court, 51 Mo. 82; Hall *v.* Bray, *Id.* 288; Commissioners *v.* Shields, 62 Mo. 247; Murdock *v.* Woodson, 2 Dill. (U. S.) 188; but under the present constitution of Missouri the question cannot arise, for the exception has been eliminated. In *Indiana* it was at first held to be a judicial question. Thomas *v.* Board of Commissioners, 5 Ind. 4. But this decision has been subsequently overruled, and it is now held to be a question for the exclusive decision of the legislature. Gentile *v.* State, 29 Ind. 409; Longworth *v.* Evansville, 32 Ind. 322; State *v.* Tucker, 46 Ind. 358. See also 1 Dill. Mun. Corp., § 48 (4th ed). In *Iowa* the early Indiana doctrine (since overruled) was followed: Ex parte Pritz, 9 Ia. 30, 36; Von Phul *v.* Hammer, 29 Iowa, 222. And so in New Jersey the question has been recently held not a question for the exclusive determination of the legislature. State *v.* Newark, 40 N. J. L. 71.

observation of American legislation. In the Supreme Court of Indiana it was said: "It would impose no restriction upon the action of the legislature, nor confer any power which that body would not possess in the absence of such a provision." And it was further said: "If that section permits the legislature to enact a special or local law *ad libitum*, in any case not enumerated, the principle involved would deprive this court of all authority to call in question the correctness of a legislative construction of its own powers under the constitution."[1] Although this decision has been overruled in the State in which it was pronounced, and although the weight of authority is no doubt opposed to its conclusion, the above reasons have never been answered. Where, however, the language of the constitutional inhibition is that special charters shall not be granted except where, *in the judgment of the legislature*, the general laws are insufficient to meet the particular case, the question is put beyond the reach of judicial construction, because the constitution itself refers every such case to the exclusive judgment of the legislature, and it is inferred, wherever a special act of such a nature is passed that the legislature has judged that general laws are insufficient to meet the case, especially where the contrary holding would overturn many charters and destroy many vested rights.[2]

§ 589. Special Act not Made General by Legislative Declaration to that Effect. — But whether the limitation on the prohibition considered in the next preceding section exists or not, an act which purports on its face to be, and is, in fact, a special act, cannot be converted into a general act, by a *declaration of the legislature* in another act that it shall be considered a general

[1] Thomas *v.* Board of Commissioners, 5 Ind. 4, 7 (followed in Ex parte Pritz, 9 Ia. 30, 36).

[2] Johnson *v.* Joliet &c. R. Co., 23 Ill. 202. This was the provision of the former constitution of Illinois, art. 10, § 1; Scates Comp. Ill. Stat. 71. The provision of the constitution of New York is the same as the early constitution of Illinois, and it has resulted in the same view, that whether a special act is necessary or not, rests wholly in the discretion of the legislature. People *v.* Bowen, 21 N. Y. 517; *s. c.* aff'd 30 Barb. 24. The legislature having created a corporation by a special act, it is not competent to the judiciary to review the discretion or judgment of the legislature and declare the act unconstitutional. Mosier *v.* Hilton, 15 Barb. (N. Y.) 657.

act;[1] otherwise the legislature might lift itself above the constitutional prohibition, by merely declaring that what it was doing was not within the prohibition.[2]

§ 590. Acts Curing Defects in the Organization of Particular Corporations. — In the early periods of American legislation, it was the fashion for the legislatures to enact statutes curing all sorts of misprisions and defects, so as to save rights in particular cases. These statutes went under the general denomination of *curative acts*. An extended reference to them would not be of much practical value; since the power to pass them has been taken from the legislatures by many recent State constitutions, in the form of ordinances prohibiting the passage of special laws.[3] The principle which was invoked to uphold such legislation was thus stated by Chancellor Kent in his commentaries: "This doctrine [that of the Dartmouth College Case] is not understood to apply to *remedial statutes*, which may be of a retrospective character, provided they do not impair contracts, or disturb absolutely vested rights; and only go to confirm rights already existing, and are in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. Such statutes have been held valid, when clearly just and reasonable and conducive to the general welfare, even though they might operate in a degree on existing rights, — as a statute to confirm marriages defectively celebrated, or a sale of lands defectively made, to pay debts of a testator or intestate. The legal rights affected in those cases by the statutes were deemed to have been *vested subject to the equity existing against them*, and which the statutes recognized and enforced."[4] In other words, these curative statutes have been supported upon the ground that acts are valid which give *remedies* where none existed before, through defects that would have been fatal, had the legislature not interfered and given a perfect remedy by curing intervening irregularities. In such cases the weight of judicial opinion seems to have been that no rights are interfered with, which are

[1] Belleville R. Co. *v.* Gregory, 15 Ill. 20.

[2] City of San Francisco *v.* Spring Valley Water Works, 48 Cal. 493.

[3] Cooley Const. Lim. (5th ed.), pp. 455 to 472.

[4] 2 Kent Com. 34.

vested in such a sense as to come within the rule that forbids the interference of the legislature.[1] According to Mr. Justice Cooley, the rule applicable to cases of this description is substantially the following: "If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law."[2] Quoting this language and applying this principle, it is held by the Supreme Court of Alabama, that it is competent for the legislature, by a curative act, to render *valid* the *organization* of a corporation, which might otherwise have been invalid by reason of the non-performance of something which the law required to be done as a *condition precedent* to the corporate existence.[3] In other words, where the State prescribes certain *conditions* as essential to the organization of a corporation, it is competent for the State to waive or dispense with such conditions; and the State waives such conditions by enacting a subsequent statute declaring the existence of the association as a corporate body, and approving or ratifying its organization and amending its charter.[4] So, in New York the conclusion has been reached that, notwithstanding a constitutional prohibition against the passage of special charters creating banking corporations, it is competent for the legislature, by a special curative act, to give validity to the corporate organization of a banking company,

[1] Syracuse City Bank *v.* Davis, 16 Barb. (N. Y.) 188, 192. See on this subject Foster *v.* Essex Bank, 16 Mass. 258; Cochran *v.* Van Surlay, 20 Wend. 365; Butler *v.* Palmer, 1 Hill (N. Y.), 325; Hepburn *v.* Curtis, 7 Watts (Pa.), 300; Johnson *v.* Wells County Comm'rs, 107 Ind. 15; Lockhart *v.* Troy, 48 Ala. 579. But it is not within the power of the legislature to pass an act obliging the courts to *construe* and *apply* a previous law, in reference to past transactions, according to the legislative judgment; the power of *interpreting* and *applying* the laws lies wholly with the courts. Lincoln Building Assoc. *v.* Graham, 7 Neb. 173.

[2] Cooley Const. Lim. (5th ed.), p. 458.

[3] Central Ag. &c. Asso. *v.* Alabama &c. Co., 70 Ala. 120; *s. c.* 9 Am. Corp. Cas. 8.

[4] *Ibid.*

which had been *informally organized* by reason of the insufficiency of its certificate of incorporation, and the acknowledgment and recording thereof.[1] The test by which to determine the validity of an act curing the defective organization of a corporation, is to consider whether the legislature had the power to create the corporation in the first instance; since it will not be denied that it has the same power to cure defects in the organization of an informally and irregularly organized corporation, as it has to bring into existence a new one.[2] Numerous instances are found where the courts have sustained statutes curing irregularities in the *votes* or other *acts* of *municipal corporations*, or the like, where a statutory power has failed of due and regular execution, through the carelessness of officers or other causes.[3]

[1] Syracuse City Bank *v.* Davis, 16 Barb. (N. Y.) 188. See also People *v.* Plank Road Co., 86 N. Y. 1.

[2] Mitchell *v.* Deeds, 49 Ill. 416, 419.

[3] Menges *v.* Wertman, 1 Pa. St. 218; Yost's Report, 17 Pa. St. 524; Bennett *v.* Fisher, 26 Ia. 497; Allen *v.* Archer, 49 Me. 346; Com. *v.* Marshall, 69 Pa. St. 328; State *v.* Union, 33 N. J. L. 350; State *v.* Guttenberg, 38 N. J. L. 419; Mutual Benefit Life Ins. Co. *v.* Elizabeth, 42 N. J. L. 235; Rogers *v.* Stephens, 86 N. Y. 623; Unity *v.* Burrage, 103 U. S. 447; Spaulding *v.* Nourse, 143 Mass. 490; Tifft *v.* Buffalo, 82 N. Y. 204; Citizens' Water Co. *v.* Bridgeport Hydraulic Co., 55 Conn. 1; Bridgeport *v.* Railroad Co., 15 Conn. 475; Truchelut *v.* City Council, 1 Nott & McC. (S. C.) 227; Frederick *v.* Augusta, 5 Ga. 561; Atchison *v.* Butcher, 3 Kan. 104; Bissell *v.* Jeffersonville, 24 How. (U. S.) 287, 295; McMillen *v.* Boyles, 6 Iowa, 304; Mattingly *v.* District of Columbia, 97 U. S. 687 (ratification by Congress of assessments against property); Lockhart *v.* Troy, 48 Ala. 579; San Francisco *v.* Certain Real Estate, 42 Cal. 513; Emporia *v.* Norton, 13 Kan. 569 (curing defects in proceedings to collect *taxes*); Mason *v.* Spencer, 35 Kan. 512 (curing defect in mode of levying *sewer tax*); Anderson *v.* Santa Anna, 116 U. S. 356, 364; Bolles *v.* Brimfield, 120 U. S. 759; Williams *v.* Supervisors, 122 U. S. 154 (tax assessments); Otoe County *v.* Baldwin, 111 U. S. 1; Katzenberger *v.* Aberdeen, 121 U. S. 172; State *v.* Newark, 3 Dutch. (N. J.) 185; New Orleans *v.* Clark, 95 U. S. 644; Grenada County *v.* Brogden, 112 U. S. 261 (distinguishing Hayes *v.* Holly Springs, 114 U. S. 120); St. Joseph Townp. *v.* Rogers, 16 Wall. (U. S.) 644; U. S. Mortgage Co. *v.* Gross, 93 Ill. 483, 494. Compare Danielly *v.* Cabanness, 52 Ga. 211; Pompton *v.* Cooper Union, 101 U. S. 196; Keithsburg *v.* Frick, 34 Ill. 405; Jasper County *v.* Ballou, 103 U. S. 745; Copes *v.* Charleston, 10 Rich. L. (S. C.) 491; People *v.* Mitchell, 35 N. Y. 551; Thomson *v.* Lee County, 3 Wall. (U. S.) 327; Bass *v.* Columbus, 30 Ga. 845; Campbell *v.* Kenosha, 5 Wall. (U. S.) 194; Stines *v.* Franklin County, 48 Mo. 167; Knapp *v.* Grant, 27 Wis. 147; Duanesburgh *v.* Jenkins, 57 N. Y. 177 (reversing *s. c.* 46 Barb. (N. Y.) 294, and distinguishing People *v.* Batchellor, 53 N. Y. 128); Kimball *v.* Rosendale, 42 Wis. 407; *s. c.* 24 Am. Rep. 421; Ritchie *v.* Franklin County, 22 Wall. (U. S.) 67; Bradley *v.* Franklin

But, keeping in mind the principle that the legislature can only *validate* where it could *authorize*, it follows that the legislature loses its power to validate, after the establishment of a *constitutional ordinance* prohibiting it from authorizing.[1] Instances of curative acts in respect of municipal corporations which have been held *void* are, — acts ratifying void assessments for local improvements;[2] acts validating a *tax* upon property not within the corporate limits when levied.[3] Instances of curative acts which have been held *valid* are, acts ratifying an *ultra vires* contract for street improvements,[4] and validat-

County, 65 Mo. 638; Lewis *v.* Shreveport, 3 Woods (U. S.), 205; Thompson *v.* Perrine, 103 U. S. 806; *s. c.* 106 U. S. 589; Dows *v.* Elmwood, 34 Fed. Rep. 114; Gardner *v.* Haney, 86 Ind. 17. As already seen (*ante*, §§ 549-551) this power is now withdrawn by many of the State constitutions. See Marshall *v.* Silliman, 61 Ill. 218, a case which arose under the present constitution of Illinois.

[1] Sikes *v.* Columbus, 55 Miss. 115; Grenada County *v.* Brogden, 112 U. S. 261; Hayes *v.* Holly Springs, 114 U. S. 120; Cairo &c. R. Co. *v.* Sparta, 77 Ill. 505; Kettle *v.* Fremont, 1 Neb. 329; Re Sackett &c. Streets, 74 N. Y. 95; Jacksonville *v.* Bassnett, 20 Fla. 525 (legalizing assessment of tax). So, the legislature may ratify the title to an *office*, after which it cannot be questioned in a proceeding by *quo warranto*. People *v.* Flanagan, 66 N. Y. 237. In Marshall *v.* Silliman, 61 Ill. 218, and Wilie *v.* Silliman, 62 Ill. 170, the Supreme Court of Illinois held that, under pretense of ratification, a *municipal corporation* could not be *coerced* by the legislature into the contracting of an indebtedness. In Elmwood Township *v.* Marcy, 92 U. S. 289, the Supreme Court of the United States, three judges dissenting, followed this decision. "Subsequent legislative sanction within constitutional limits is equivalent to original authority." Dill. Mun. Corp. (4th ed.), § 544. The learned author cites to this truism, Wilson *v.* Hardesty, 1 Md. Ch. 66; Jasper County *v.* Ballou, 103 U. S. 745; Shaw *v.* Norfolk R. Co., 5 Gray (Mass.), 180; Satterlee *v.* Matthewson, 2 Pet. (U. S.) 380; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627; Watson *v.* Mercer, 8 Pet. (U. S.) 88; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420; Stanley *v.* Colt, 5 Wall. (U. S.) 119; Croxall *v.* Shererd, 5 Wall. (U. S.) 268; Keithsburg *v.* Frick, 34 Ill. 405. That a doubtful, obscure or covert validation will not be upheld, see Hayes *v.* Holly Springs, 114 U. S. 120.

[2] Baltimore *v.* Horn, 26 Md. 194. Comp. Lennon *v.* New York, 55 N. Y. 361; Baltimore *v.* Porter, 18 Md. 284 (where the attempt was made to ratify *by ordinance* a void assessment). In People *v.* Lynch, 51 Cal. 15; *s. c.* 21 Am. Rep. 676, and in Schumacher *v.* Tobeman, 56 Cal. 508, it was held that the legislature could not legalize a void assessment, nor by direct act make an assessment within an incorporated city.

[3] Atchison &c. R. Co. *v.* Maquillon, 12 Kan. 301.

[4] Brown *v.* Mayor, 63 N. Y. 239. See also Duanesburg *v.* Jenkins, 57 N. Y. 177; O'Hara *v.* State, 112 N. Y. 146.

ing municipal *subscriptions* to the stock of a private corporation.[1]

§ 591. What is a "Local Law" within the Meaning of such a Prohibition. — In the constitutions of some of the States, as already seen,[2] the prohibition is in form against the passage of *local* or special laws relating to many subjects, among them to the subject of corporations. In the constitution of Georgia, the prohibition is against the passage of local acts where there is a general law embracing the same subject-matter. A local act, therefore, concerning elections, etc., in a particular county, to determine whether municipal bonds should be issued was void, there being a general statute in force on the same subject.[3] In New York, the prohibition is against the passage of *private* or *local* bills, granting to corporations the right to lay down railway tracks, or granting to them any exclusive privilege, immunity or franchise whatever, — an application of which has already been considered.[4] The Supreme Court of Wisconsin has pointed out that acts may be general acts within the meaning of the provision of the constitution of that State that "no general law shall be in force until published," and special or local acts within the

[1] Bridgeport *v.* Railroad Co., 15 Conn. 475; Winn *v.* Macon, 21 Ga. 275; Municipality *v.* Theater Co., 2 Robb. (La.) 209. Proceeding on these or similar grounds, the courts have upheld special statutes curing *marriages* defectively celebrated: Goshen *v.* Stonington, 4 Conn. 209, 221; *s. c.* 10 Am. Dec. 121; State *v.* Adams, 65 N. C. 537 (validating slave marriages); Andrews *v.* Page, 3 Heisk. (Tenn.) 653 (legitimating children). Compare White *v.* White, 105 Mass. 325. Judicial sales defectively made: Beach *v.* Walker, 6 Conn. 190, 197. See Cooley Const. Lim. (5th ed.) 459, and cases cited in note 2; *judgments* defectively entered: Underwood *v.* Lilly, 10 Serg. & R. (Pa.) 101; *certificates of acknowledgment* of deeds by married women defectively drawn: Tate *v.* Stooltzfoos, 16 Serg. & R. 35; Chestnut *v.* Shane, 16 Oh. 599 (overruling Connell *v.* Connell, 6 Oh. 358; Good *v.* Zercher, 12 Oh. 364; Meddock *v.* Williams, 12 Oh. 377, and Silliman *v.* Cummins, 13 Oh. 116). See also Dulany *v.* Tilghman, 6 Gill & J. (Md.) 461; Journeay *v.* Gibson, 56 Pa. St. 57; Grove *v.* Todd, 41 Md. 633; *s. c.* 20 Am. Rep. 76; Montgomery *v.* Hobson, Meigs (Tenn.), 437. But see Routsong *v.* Wolf, 35 Mo. 174; Russell *v.* Rumsey, 35 Ill. 362. Usurious contracts previously made, and which under the statute with regard to usury were void in part. Savings Bank *v.* Allen, 28 Conn. 97. Compare Welch *v.* Wadsworth, 30 Conn. 149.

[2] *Ante*, § 539.

[3] Dougherty County *v.* Boyt, 71 Ga. 484.

[4] *Ante*, § 585; Astor *v.* New York &c. R. Co., 113 N. Y. 93; 20 Northeast. Rep. 594.

meaning of a constitutional inhibition against the passage of local laws containing more than one subject and that not expressed in the title.[1] It has been held in that State that "an act to legalize and authorize the assessment of street improvements and assessments," which in its body related solely to certain street assessments in the city of Janesville, and undertook to legalize the same, was a general law within the provision above quoted relating to the publication of laws, so that it would not take effect until published, but was at the same time a local law within the meaning of the constitutional inhibition concerning the titles of statutes, and was therefore void because the subject of it was not expressed in its title.[2] The court held that "the subject of a local act cannot be expressed in the title without reference to the *place* over which it is to operate being made known therein."[3] On the same lines of reasoning, the same court has held that "an act to incorporate the Yellow River Improvement Company," which, besides creating the corporation with ordinary corporate powers, authorized it to improve the Yellow River within two specified counties, for the purpose of facilitating the running of logs, etc., and, after expending a certain sum of money for that purpose, to collect tolls on logs, etc., floated down the river, was a local act within the meaning of the constitutional provision touching the entitling of laws; but whether it was a *special* or *private* law the court did not determine.[4] To this principle the Supreme Court of Pennsylvania have annexed the following qualification: "Whenever the provisions of an act are compulsorily binding upon every city of the particular classification, the legislation is general and constitutional. Whenever the provisions are binding at the option of the local authorities, the legislation is special, local and unconstitutional."[5]

§ 592. Statute is General when Uniform in its Operation upon All the Members of a Particular Class. — Statutes which

[1] See Yellow River Improvement Co. *v.* Arnold, 46 Wis. 214, 222; Durkee *v.* Janesville, 26 Wis. 697; Mills *v.* Charleton, 29 Wis. 400; Phillips *v.* Albany, 28 Wis. 340; Lawson *v.* Milwaukee &c. R. Co., 30 Wis. 597.

[2] Durkee *v.* Janesville, 26 Wis. 697.

[3] *Ibid.*

[4] Yellow River Improvement Co. *v.* Arnold, 46 Wis. 214.

[5] Reading *v.* Savage, 120 Pa. St. 198; opinion by Ermentrout, J.

are general and uniform in their operation upon all persons coming within the class to which they apply, are not obnoxious to constitutional provisions against special legislation. Accordingly, statutes which embrace all persons who are, or may come into certain situations and circumstances, and which are "general and uniform, not because they operate upon every person in the State, for they do not, but because every person, who is brought within the relations and circumstances provided for, are affected by the law," are not within such a prohibition.[1] Thus, legislation which classifies *railroads* and imposes restrictions in respect of *tariffs*, is valid, if it bears uniformly upon each class.[2]

§ 593. Provided Classification Natural, and not Arbitrary.— But the proposition of the foregoing section is subject to the qualification that the classification has some *reasonable foundation in the nature of things* and is not arbitrarily made to afford means of evading the constitutional inhibition. In the view expressed by Chief Justice Beasley, something more is required to render such legislation valid "than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantive distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation."[3] Following up the same idea, it was said in a later case by Vice-Chancellor Van Fleet: "Legislation in respect to matters enumerated in this paragraph of the constitution, affecting particular subdivisions or parts of the State and not others, may be valid;

[1] Little Rock &c. R. Co. *v.* Hanniford, 249 Ark. 291; McAunich *v.* Mississippi &c. R. Co., 20 Ia. 342; Iowa &c. R. Co. *v.* Soper, 39 Ia. 116; Chicago &c. R. Co. *v.* Iowa, 94 U. S. 163; Humes *v.* Missouri Pacific R. Co., 82 Mo. 221; Davis *v.* State, 3 Lea (Tenn.), 379; Railroad Co. *v.* Iowa, 94 U. S. 155; Thomas *v.* Wabash &c. R. Co., 40 Fed. Rep. 126.

[2] Dow *v.* Beidelman, 49 Ark. 325; Railroad Co. *v.* Iowa, 94 U. S. 155.

[3] Richards *v.* Hammer, 42 N. J. L. 435, 440.

but to be valid, it must, as I understand the adjudications, rest on some characteristic or peculiarity, plainly distinguishing the places included from those excluded; while, if it embraced those excluded, it would be so inappropriate to their condition as to be of no advantage or benefit to them. But legislation of this kind, which is controlled in its operation as to locality by a mere arbitrary distinction, having no affinity to or connection with the subject-matter of the legislation, falls within the constitutional interdiction, and is invalid." [1]

§ 594. Illustration: Invalidity of Statutes Operative only in Cities having a Certain Number of Inhabitants. — It has been held in numerous instances that statutes which, by their terms, operate only in cities, towns, or counties which have a certain number of inhabitants, are within this constitutional inhibition against the passage of local and special laws. It was said of such a statute by Van Fleet, V. C., in the Chancery Court of New Jersey: "It is the law in cities and towns and villages having a population of not more than 11,000 and not less than 2,000, and no where else. The question whether it is effective or not in any particular place is determined by the number of its inhabitants and nothing else." And it was held invalid, on the principles stated in the preceding section.[2] - - - - In like manner, the Supreme Court of Pennsylvania have held, under a constitutional provision that "the general assembly shall not pass any local or special law regulating the affairs of counties, cities, townships," — etc., that an act providing that, in counties the population of which exceeds 100,000 and falls below 150,000, the fees belonging to certain county officials shall be turned over to another, is unconstitutional, as being an attempt to legislate directly for certain particular counties selected from all others, there being but four counties in the State which could be affected by the act.[3] Under such a provision an act providing for the *dissolution* of

[1] Atlantic City Water Works Co. *v.* Consumers Water Co., 44 N. J. Eq. 427, 435.

[2] Atlantic City Water Works Co. *v.* Consumers Water Co., 44 N. J. Eq. 427, 435.

[3] McCarthy *v.* Com., 110 Pa. St. 243. Other decisions under similar constitutional provisions are: Tierney *v.* Dodge, 9 Minn. 166; *s. c.* 12 Minn. 41; Virginia City *v.* Mining Co., 2 Nev. 86; Von Phul *v.* Hammer, 29 Ia. 222; Atty.-General *v.* Railroad Co., 35 Wis. 425; Kimball *v.* Rosendale, 42 Wis. 407; Stevens Point &c. Co. *v.* Reilly, 44 Wis. 295; Welker *v.* Potter, 18 Oh. St. 85; Lafayette *v.* Jenners, 10 Ind. 70, 80. As to a constitutional provision that there shall be but one system of town and county government, which shall be as nearly uniform as practicable, see State *v.* Dousman, 23 Wis. 541; State *v.* Riordan, 24 Wis. 484.

a bankrupt municipal corporation has been held void.[1] But an act creating a new *class* of such corporations, and imposing upon all cities of the class the same powers and duties is valid.[2]

§ 595. Other Cases Illustrating these Distinctions.— The following cases have been cited in illustration of the foregoing distinctions.[3] A statute which would give to all cities in this State, situated *on tide water* the privilege of using such waters in connection with their sewers; [4] or which should give to all the cities in the State bordering upon tide water, power to construct dikes or to establish quarantine regulations; [5] or which should provide that, in all towns having *volunteer fire departments*, the men should have power to choose a commissioner to govern them,[6] would be a *valid* exercise of legislative power. On the other hand, a statute which should declare that, all *cities containing a certain number of inhabitants* should have one system for laying out streets, and that those having a smaller population should have another; [7] or which should delare that, in every city in which there are *ten churches*, there should be three commisioners of the water department with certain prescribed duties; [8] or which should confer upon cities having a *population of not less* than 25,000, the power to issue bonds to fund their floating debts, — [9] would be *invalid*, for the reason that such statutes would all be controlled, as to localities in which they should have effect by a quality or characteristic which is purely *arbitrary*, and which has no connection whatever with their subject-matter.[10]

§ 596. Corporations Carrying on Operations in Specific Localities. — But a constitutional provision that "corporations may be formed under general laws, but shall not be created by special act

[1] State *v.* Starke, 18 Fla. 255.

[2] Lake *v.* Florida, 18 Fla. 501. See also 2 Dill. Mun. Corp. (4th ed.,) §§ 701*a*, 701*b*. Under a constitutional provision that corporations shall not be created by special acts except for municipal purposes, a board of commissioners charged with the duty of filling up certain slough-ponds in a city has been held a corporation for municipal purposes, and validly created. St. Louis *v.* Shields, 62 Mo. 247. See also Wharton *v.* Mobile School Commrs., 43 Ala. 598.

[3] Referring to the doctrine of § 493, *ante*.

[4] Richards *v.* Hammer, 42 N. J. L. 435.

[5] *Ibid.*

[6] Anderson *v.* Trenton, 42 N. J. L. 486.

[7] Van Riper *v.* Parsons, 40 N. J. L. 1.

[8] Richards *v.* Hammer, 42 N. J. L. 435.

[9] Anderson *v.* Trenton, 42 N. J. L. 486.

[10] These illustrations are given by Van Fleet, V. C., in Atlantic City Water Works Co. *v.* Consumers Water Co., 44 N. J. Eq. 427

except for municipal purposes," has been held not to extend so far as to prevent the legislature from creating, by an act which purports to be general in its character, a corporation to carry on operations in specific localities, which, from the nature of the case, could not be carried on elsewhere in the State, — as, for instance, a corporation for the promotion of slack-water navigation in certain counties. Said the court: "The great purpose of the provision was to introduce a system of legislation in regard to the institution of corporations which would exclude the corruption and party favoritism which had too often accompanied the method previously in vogue, and to secure, as far as practicable, for all the people of the State, an equality of opportunity and a guard against sectional discriminations. It was determined that corporations of the class in question should owe their erection to general laws and not to special acts, and, within this principle, that no law, general in form, should be allowed to localize the specific work or business of the corporation within narrower bounds than it would naturally be compelled to occupy if not thus localized by enactment. At the same time it was not designed to hinder the confinement of the specific work or business of the corporation, by the terms of the law, within a given section, in any case when, in consequence of natural conditions, such work or business could not be carried on elsewhere." [1]

§ 597. Creation of a Park District Outside of the Corporate Limits of a City. — Under a constitution prohibiting the legislature from creating municipal corporations, *except cities*, by special act, and providing that no city shall be incorporated with less than 5,000 permanent inhabitants, etc., it has been held beyond the power of the legislature to incorporate a board of park commissioners and a park district, outside a city, for the purpose of establishing and maintaining a public park for the pleasure of the inhabitants of the city. The court, speaking through Wagner, J., said: "By this act there is no municipal corporation chartered nor attempted to be chartered. The declaration that the corporation is for municipal purposes does not make it so. There may be corporations for municipal purposes, but they must be connected with the municipal corporation itself, and instituted for purposes of carrying out some of the known objects of the municipality. But in the present case a district outside of the city is incorporated; none of the commissioners who have the exclusive management and control of it reside within its boundaries; the people who own the lands within it are taxed against their consent by persons who have no interests in common with them, and then they are gravely told that resist-

[1] Attorney-General *v.* McArthur, 38 Mich. 204, opinion by Graves, J.

ance is useless — that they have been incorporated for municipal purposes. If this can be done, then special acts of incorporation for municipal purposes may be passed in the vicinity of all our towns which do not rise to the dignity of cities, but are nevertheless municipal corporations, and the farming community will be made to pay for whatever they fancy or conceive will redound to their benefit. If the legislature can do this, it is difficult to set any bounds to their power. The constitution never contemplated such an exercise of power, but sought, on the contrary, to place a prohibition on it.'' [1]

§ 598. What Statutes have been Held Local or Special. — Statutes authorizing a certain school district to *issue bonds* to erect a *school house*, and setting aside funds to pay the same; [2] authorizing a precinct to *issue bonds* to erect a *court-house;* [3] and *extending* the *corporate limits* of a particular city over land which before its passage was not within such limits, [4] have been held void, under a constitutional provision forbidding the passage of special laws conferring corporate powers. - - - - An act purporting to authorize the *establishment* of a *single ferry*, at a designated point on a particular river, has been held void, under a constitutional prohibition against licensing ferries by local or special laws. It was well pointed out concerning the act that it was not only limited in its application to *one* ferry, but that one was located at a *definite place;* and the court observed that it contained no feature of an act of general application, but that its whole scope and purpose were special. [5] - - - - The following case was held not to be the case of legislation affecting *a particular class*, within a principle above explained, [6] and the statute was accordingly held void: — Under the general corporation act of Illinois, all railroad corporations, whose lines terminate on bordering navigable streams, have power to condemn lands at their *terminus*, in order to reach *ferries*. It was held by Mr. District Judge Allen that the proviso of a later statute, [7] limiting the right to own and use boats to carry freight and passengers, to '' such railroad companies as *own the landing* for such water craft,'' was within the prohibition of the constitution of that State against the passage of special laws granting special or exclusive privileges to corporations; and, further, that the statute could not be upheld on the ground that it classified the railroad companies whose roads terminated on bordering rivers into

1 State *v.* Leffingwell, 54 Mo. 458, 472.

2 Clegg *v.* Richardson County School District, 8 Neb. 178; School District *v.* Insurance Co., 103 U. S. 707.

3 Dunby *v.* Richardson County, 8 Neb. 508.

4 Wyandotte *v.* Wood, 5 Kan. 603.

5 Frye *v.* Partridge, 82 Ill. 267.

6 *Ante*, § 592.

7 Ill. Act May 24th, 1877.

such as then owned a landing place and such as did not.[1] - - - - On more doubtful grounds, a statute for the incorporation of *street railways*, in cities of the second and third class, has been held void, within a constitutional prohibition against the passage of *local* and *special* laws,— the court taking the view that the act was special, because it related to but a certain class of street railway corporations, and that it was local, because confined to cities of the second and third classes.[2] While this holding may be sustained under the stringent view taken by the Supreme Court of Pennsylvania of such a constitutional provision, it is obvious from the instances collected in the next section, that such a statute would be regarded as good in several of the other States having a similar constitutional prohibition.[3] - - - - A statute authorizing any number of persons not less than seven, a majority of whom should reside in the State, to form a company for the purpose of constructing water-works in any city, town or village in the State having a population of not more than 150,000 nor less than 2,000, for the purpose of supplying such city, town or village and the inhabitants thereof with water, has been held void, under a constitutional inhibition against passing *private*, *local*, or *special laws*, granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever; and also under a provision prohibiting the passage of *special laws*, conferring corporate powers, but requiring the legislature to pass general laws under which corporations might be organized and corporate powers of every nature obtained.[4] As this statute was both local and special, it was held that if, as decided in a former case,[5] it invested a corporation created under it with an exclusive franchise, it was void.[6]

§ 599. Instances of Statutes Held not Local or Special. — The following are instances of statutes which have been held not

[1] Thomas *v.* Wabash &c. R. Co., 40 Fed. Rep. 126.

[2] Weiman *v.* Wilkinsburg &c. R. Co., 118 Pa. St. 192.

[3] In Pennsylvania, it has been held that a statute which undertakes to deal with mechanics' liens in counties whose population is less than 200,000, is void, as a *local law*,— the court reasoning that the statute did not attempt to *classify* counties for any purpose of *local government*, but merely attempted to provide a lien in one part of the State, in circumstances which would not entitle the mechanic to a lien under a general law. Davis *v.* Clark, 106 Pa. St. 377. See also Morrison *v.* Bachert, 112 Pa. St. 323, where the court declared its purpose "to adhere rigidly to that instrument [the constitution], that the people may not be deprived of its benefits."

[4] Const. N. J. Amendment 1875, art. 4, par. 11, § 7.

[5] Atlantic City Water Works Co. *v.* Atlantic City, 39 N. J. Eq. 367.

[6] Atlantic City Water Works Co. *v.* Consumers Water Co., 44 N. J. Eq. 427, 434.

obnoxious to constitutional prohibitions against the passage of special laws. An act making it *punishable* for *railroad employés* to burn, mutilate, haul off, or bury stock killed by trains;[1] appropriating five thousand dollars to aid the Farmers' Protective Association of Iowa, a corporation organized to provide the farmers of that State with *barbed wire*, at the actual cost of manufacture, and to defend suits for the alleged infringement of patents;[2] authorizing the board of education of a particular city to issue *bonds* of the school district, for the purpose of purchasing a site for the *school buildings*, erect buildings, etc., to an amount not exceeding $100,000 upon a majority vote of the electors of the district, — the court holding that this was neither a special law nor a law conferring corporate power;[3] providing that *foreign corporations* created for the purpose of making and guaranteeing bonds may be accepted as *sureties* by the courts, etc., — the court holding this not unconstitutional as a special law regulating the *practice of the courts;*[4] regulating *rates of charges* for the carriage of passengers by railroad companies, imposing a penalty for overcharges, and including in such penalty a reasonable *attorney's fee;*[5] authorizing the organization of annuity, *safe deposit* and *trust companies*, and granting to such corporations the power to act as *guardians* of the estates of *insane persons*, — such a statute being a general law for the organization of corporations for certain purposes and defining their powers;[6] exempting *seaside railroads* from the *receivership* imposed by the body of the act on railroads which fail to run trains for a given time, — this not being a special law conferring corporate privileges;[7] providing for the

[1] Bannon *v.* State, 49 Ark. 167.

[2] Merchants' Union Barbed Wire Co. *v.* Brown, 64 Ia. 265. The decision is a shameful one, as the act appropriates public money, raised by taxation, for purposes which are purely private in their character.

[3] Knowles *v.* Topeka, 33 Kan. 692. This decision seems clearly unsound. It is opposed to the following cases: Clegg *v.* Richardson County School District, 8 Nebr. 178; School District *v.* Insurance Co., 103 U. S. 707; *ante*, § 598.

[4] Cramer *v.* Tittel, 72 Cal. 12.

[5] Dow *v.* Beidelman, 49 Ark. 455; citing Peoria &c. R. Co. *v.* Duggan, 109 Ill. 537; Kansas Pacific R. Co. *v.* Yanz, 16 Kan. 583; Missouri Pacific R. Co. *v.* Abney, 30 Kan. 41.

[6] Minnesota Loan & Trust Co. *v.* Beebe, 40 Minn. 7; *s. c.* 41 N. W. Rep. 232.

[7] Delaware Bay &c. R. Co. *v.* Markley, 45 N. J. Eq. 139; 16 Atl. Rep. 436.

organization of *loan associations*, and enacting that no premiums, fines or interest in such premium that may accrue under the act shall be deemed *usurious*, — this not being a *local* or *special* law regulating the rate of interest on money; [1] requiring all *electric wires*, in any city having a population of 500,000 or more, to be placed under the surface of the streets, and providing for a board of commissioners of electric sub-ways, etc.; [2] appropriating money to be expended in removing obstructions from and improving the *navigation* of a *certain river* which falls into a navigable water of the State, — this not being a *private* or *local* purpose, requiring a *two-thirds vote* under the constitution of New York; [3] enabling a *particular foreign corporation* to be *sued* within the State, — the same not being a *private* or *local* bill within the same constitutional provision; [4] regulating the *inspection of grain* in a *particular city*; [5] authorizing a *plank road company* to *mortgage* its road, — the same not being a "*private* or *special* law" providing for the sale or conveyance of any real estate belonging to any persons, but merely an *amendment* of a *charter*; [6] fixing the rate of *compensation* to be paid by a *boom company* to the surveyor-general of logs, for surveying logs coming within its boom, at a rate less than that fixed by the general law, the statute affecting equally the rights and interests of all owners of logs within the designated territory, — this not being *partial* or *unequal* legislation; [7] *amending the charter* and *enlarging the powers* of a corporation *previously existing*; [8] conferring upon a board of police commissioners the power to appoint and control the policemen of a city, even though the expenses of the police establishment are defrayed by city taxation.[9] - - - - The constitution of Alabama, in force in 1868, declared that "corporations may be formed under general laws, but shall not

[1] Winget *v.* Quincy Building &c. Assoc., 128 Ill. 67; *s. c.* 21 Northeast. Rep. 12.

[2] Western Union Tel. Co. *v.* Mayor, 38 Fed. Rep. 552.

[3] People *v.* Allen, 1 Lans. (N. Y.) 248; Const. N. Y. 1846, art. 1, § 9.

[4] Fall Brook Coal Co. *v.* Lynch, 47 How. Pr. (N. Y.) 520.

[5] People *v.* Harper, 91 Ill. 357.

[6] Joy *v.* Jackson &c. Co., 11 Mich. 155.

[7] Merritt *v.* Knife Falls Boom Corp., 34 Minn. 245; 25 Northwest. Rep. 403. See also Augusta &c. R. Co. *v.* Randall, 79 Ga. 304.

[8] State *v.* Clark, 23 Minn. 422. But see *ante*, § 585.

[9] Ohio *v.* Covington, 29 Ohio St. 102.

be created by special act, except for municipal purposes." With this constitutional provision in force, the legislature of Alabama passed a special act authorizing the Wills Valley Railroad Company (a pre-existing corporation) to purchase the railroad and franchises of the Northeast & Southwestern Alabama Railroad Company (another pre-existing corporation), and, after doing so, to *change its* own *name* to that of the Alabama & Chattanooga Railroad Company. The Supreme Court of the United States held that this act was not within the constitutional inhibition. Mr. Justice Bradley, in giving the opinion of the court, said: "We are unable to see anything in this legislation repugnant to the constitutional provision referred to. That provision cannot, surely, be construed to prohibit the legislature from changing the name of a corporation, or from giving it power to purchase additional property; and this was all that it did in this case. No new corporate powers or franchises were created."[1]

§ 600. Special Statutes Granting Exclusive Privileges, Immunities or Franchises. — In determining whether a statute falls within a constitutional inhibition against the passage of private, local or special laws "granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever, the courts will not find such grants in the statute by implication; for while courts will resort to implications to sustain a statute, they will not to destroy it. If, therefore, such a statute admits of two constructions, one of which will render it unconstitutional and the other not, that construction will be adopted which will render it valid, for it must not be presumed that the legislature intended to violate the constitution.[2]

[1] Wallace *v.* Loomis, 97 U. S. 146; *s. c.* 10 Myer Fed. Dec., § 20. Under the constitution of New York, it was competent for the legislature to create corporations other than banks by special charter. Const. N. Y., art. 8, § 1. The United States Trust Company of New York was held not to be a bank within the meaning of this provision and hence to have been chartered by the legislature in the valid exercise of its powers. United States Trust Co. *v.* Brady, 20 Barb. (N. Y.) 119.

[2] Atlantic City Water Works *v.* Consumer's Water Co., 44 N. J. Eq. 427, 437. This case contains a curious and very doubtful application of this principle.

§ 601. Conferring Certain Public Police Powers upon Existing Corporations.— A statute which confers certain *police powers* upon existing corporations, to be exercised for the *public good*, not for the benefit or emolument of such corporations or their members, is not obnoxious to such a constitutional provision, although it refers to them in terms as "existing corporations," since these words may be regarded as *descriptio personarum*. The reason is that the powers are *not corporate powers* in a proper sense, and are not conferred upon the corporations named *as* corporations. It was so held in respect of an act of the legislature "to regulate the *practice of medicine*," which conferred the power of appointing boards of examiners upon three certain medical societies, therein named as existing corporations, and which prohibited the appointment of such examiners by any other corporation, society, person, or persons, and made it a misdemeanor for any person except an appointee of one of the three societies named to sign, seal or issue a certificate purporting to authorize the practice of medicine.[1]

§ 602. Empowering Existing Municipal Corporations to Subscribe for Stock in Private Corporations.—On the other hand, where there is a constitutional provision that corporations "shall not be created by special act, except for municipal purposes," it is held not competent for the legislature to pass a special act conferring upon an existing municipal corporation the power to subscribe to the stock of a corporation created for commercial purposes, such as a steam navigation company. With such a constitutional inhibition in force, a special statute authorizing a municipal corporation, under certain conditions, to loan its credit, etc., "to any improvements," must be restrained so as to mean any improvement which is the proper subject of police and municipal regulation, such as gas, water, almshouses, hospitals and the like, and cannot be extended to subjects foreign to the objects of the corporation, existing or to be carried on beyond its territorial limits.[2] To construe such a statute so as to allow a city to engage in commercial speculations would, it was said, violate the constitutional prohibition above recited, because it

[1] Ex parte Frazer, 54 Cal. 94.

[2] Low *v.* Marysville, 5 Cal. 214.

would operate to grant to the corporation powers, by a special act, for other than municipal purposes.[1]

ARTICLE III. RESTRAINTS AS TO THE TITLES OF LAWS.

§ 607. Constitutional Restraints as to the Titles of Statutes. — The constitutions of most of the States contain provisions

[1] *Ibid.* It is pointed out by Judge Dillon that "there is no power in a municipal corporation (even supposing it to be competent for the legislature to confer such power), as incidental to the usual grants of municipal authority, to take stock in a manufacturing company located in or near the corporation (citing Cook *v.* Manufacturing Co., 1 Sneed (Tenn.), 698; Commercial Nat. Bank *v.* Iola, 2 Dill. (U. S.) 553,) or to aid or engage in other enterprises essentially private." 1 Dill. Mun. Corp. (4th ed.), § 161. To the last point, see Clark *v.* Des Moines, 19 Iowa, 199; Hanson *v.* Vernon, 27 Iowa, 28; Pennsylvania R. Co. *v.* Philadelphia, 47 Pa. St. 189. But an act *confirming* a municipal tax assessed to aid in "manufacturing purposes, and for the better securing an abundant supply of water for the city," has been held valid. Frederick *v.* Augusta, 5 Ga. 561. As already seen (*ante*, § 549), the power of municipalities to extend their aid to private corporations has been withdrawn by many of the State constitutions. Nevertheless, in some States the power still exists, and even where it has been withdrawn many undetermined questions remain which have arisen under such municipal subscriptions before the power was withdrawn. *Post*, § 1115. *et seq.*

like the following, which is found in the constitution of Missouri: "No bill . . . shall contain more than one subject, which shall be clearly expressed in its title."[1] Others contain a similar provision restricted to *private* or *local* bills, like the following, which is found in the constitution of New York: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."[2] It is perceived that these provisions require two things, each relating to a different part of the bill: 1. It must be *single* in respect of its subject-matter. 2. That single subject-matter must be *expressed* in its *title*. If, therefore, the statute embraces more than one subject it is void, whether or not the subject is expressed in its title. On the other hand, although a statute may embrace but one subject, it is still void if *that* subject be not expressed in its title.

§ 608. Such Provisions Mandatory. — Such constitutional provisions are *mandatory*, and not merely directory to the legislature; the courts, and not the legislature, are the final judges of whether they have been complied with; and if a statute is passed in violation of such a provision, the courts will set it aside in whole or in part,[3] according to its nature.[4] The legislature cannot *evade* a constitutional provision that no *private* or local law shall be passed embracing more than one subject, and that expressed in its title, — by *declaring* that such an act is a *public* law.[5]

§ 609. Judicial Expressions as to the Design of these Provisions. — Although the design of such a constitutional provision may seem obvious, a clearer understanding of the subject may perhaps be had if the discussion is prefaced by some judicial statements of that design. The Court of Appeals of New York

[1] Const. Mo. 1875, art. 4, § 28.

[2] Const. N. Y., art. 3, § 16.

[3] *Post*, §§ 625, 658.

[4] Weaver *v.* Lapsley, 43 Ala. 224; State *v.* Miller, 45 Mo. 595; Cannon *v.* Hemphill, 7 Tex. 184; People *v.* Fleming, 7 Col. 230. To this statement *exceptions* exist in *California* and *Ohio*, where the provision is held to be merely directory to the legislature, — which is tantamount to frittering it away entirely: Washington *v.* Page, 4 Cal. 388; Pierpont *v.* Crouch, 10 Cal. 315; Pim *v.* Nicholson, 6 Ohio St. 176.

[5] Belleville &c. R. Co. *v.* Gregory, 15 Ill. 20.

have said that "the design of the constitutional provision was to prevent the uniting of various objects having no necessary or natural connection with each other, in one bill, for the purpose of combining various pecuniary interests in support of the whole, which could not be combined in favor of either by itself." [1] Another purpose of the provision has been declared to be "that neither the members of the legislature nor the public should be misled by the title, — not that the latter should embody all the distinct provisions of the bill in detail." [2] Again, it has been said: "The constitutional provision referred to has been deemed by statesmen and jurists, *conditores legum*, of so much importance that it is found in the fundamental laws of most of the States. Its purpose is to prevent fraud and deception by concealment, in the body of acts, of subjects not by their titles disclosed to the general public and to legislators, who may rely upon them for information as to pending legislation.[3] Again, it has been said by the Supreme Court of Michigan: "There was no design by this clause to embarrass legislation, by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design, when required to pass upon it." [4] In like manner it has been said of the same constitutional provision by Beasley, C. J., that its purpose is plainly twofold: "First, to insure a separate consideration for every subject presented for legislative action; second, to insure a conspicuous declaration of such purpose. By the former of these requirements, every subject is made to stand on its own merits, unaffected by 'improper influences,' which might result from connecting it with other measures having no proper relation to it; and, by the latter, a

[1] Conner *v.* The Mayor, 5 N. Y. 293.

[2] Sun Mutual Ins. Co. *v.* Mayor, 8 N. Y. 241, 253. See also People *v.* Lawrence, 36 Barb. (N. Y.) 192; Brewster *v.* Syracuse, 19 N. Y. 116; People *v.* Commissioners, 47 N. Y. 501.

[3] Astor *v.* Arcade R. Co., 113 N. Y. 93, 109, per Earl, J.

[4] People *v.* Mahaney, 13 Mich. 481, opinion by Cooley, J

notice is provided, so that the public, or such part of it as may be interested, may receive a reasonable intimation of the matters under legislative consideration." [1] The Supreme Court of Alabama have also said: "It has been often said in this court, repeating the words of other courts, that this clause of the constitution is intended to accomplish but one purpose, the suppression of a practice which had been too prevalent, leading at times to unfortunate, if not corrupt legislation, by which several projects or subjects, having no proper relation to each other, were combined in one bill, and the supporters of each *assisted* in passing all into law; or, clauses were inserted, of which the title gave no intimation; and the prevention of the deception of the legislature, and the people, by concealing under alluring titles legislation which, if its real character had been disclosed, would have been condemned." [2]

§ 610. Construed Liberally in Support of Legislation: General Expressions of this Doctrine. — The courts everywhere agree in taking the view that these constitutional restraints should not receive a rigid and exact application, but that they should be construed and applied liberally with the view of supporting, rather than of overturning, acts of the legislature.[3] As this is a subject of great importance, especially in connection with the titles of statutes conferring or extending corporate powers, we shall take the liberty of quoting at considerable length expressions of judicial opinion confirming this view, and indicating the general lines of thought on which the courts proceed in applying such provisions. - - - - "It is settled by abundant authorities, resting on sound reason and principles, that the title of an act is not required to enumerate all the particulars, incidents and details by which its object is to be carried out. The constitution requires only that the title should announce its *general object.* The provisions in the body of the act, such as are ancillary to accomplish the purpose of the act and come within its purview, which are incidental or germane thereto, are considered as covered by the title, where its language is broad enough to include the same." [4] - - - - "This

[1] Rader *v.* Union Township, 39 N. J. L. 509.

[2] Montgomery &c. Assn. *v.* Robinson, 69 Ala. 413, 416, opinion by Brickell, C. J.

[3] Harris *v.* Niagara County Supervisors, 33 Hun (N. Y.), 279; Blake *v.* People, 109 Ill. 504; Otoe County *v.* Baldwin, 111 U. S. 1.

[4] Mississippi &c. R. Co. *v.* Wooten, 36 La. An. 441, opinion by Bermudez, C. J.

provision of the constitution must receive a fair and reasonable construction; one which will repress the evil designed to be guarded against, but which, at the same time, will not render it oppressive or impracticable."[1] - - - - Such a constitutional provision has been said to have been adopted to prevent *amendments* to legislative enactments, by which distinct and unconnected matters might be introduced; hence it "should not be so construed as to restrict legislation to such an extent as to render different acts necessary, where the whole subject-matter is *connected*, and may be properly embraced in the same act." And the rule has been laid down "that none of the provisions of a statute should be regarded as unconstitutional, where they all relate, directly or indirectly, to the same subject, have a *natural connection*, and are not foreign to the subject expressed in the title."[2] - - - - Again, it has been said: "In the construction of this and similar constitutional provisions, prescribing rules of legislative procedure, the observance of which is essential to the validity of legislative enactments, the courts have kept steadily in view the purposes of their adoption, and have avoided a closeness of construction tending to embarrass legislation."[3] - - - - The same court said in an earlier case: "The evil contemplated was not the generality and comprehensiveness of titles. Those faults do not tend to mislead or deceive. . . . The particular subject selected by the legislature, and put in the title, must embrace every part of the law. The question must always be, whether, taking from the title the subject, we can find anything in the bill which cannot be referred to that subject. If we do, the law embraces a subject not described in the title. But this conclusion should never be attained, except by argument, characterized by liberality of construction and freedom from all nice verbal criticism."[4] - - - - And the same court has added: "No statute having but one general object, reasonably and fairly indicated by its title, has been condemned because of the generality of the terms of the title. Whatever provisions that have, by fair intendment, a necessary or proper connection with the subject expressed in the title, may be introduced into the body of the enactment. When the generality of the title is not made a cover for legislation incongruous to, or diverse from, the subject expressed, the spirit and purpose of the constitution

[1] Belleville &c. R. Co. *v.* Gregory, 15 Ill. 20, 29, opinion by Caton, J.

[2] Phillips *v.* Covington &c. Co., 2 Metc. (Ky.) 219, 222; McReynolds *v.* Smallhouse, 8 Bush (Ky.), 447, 453. See also Louisville &c. Turnp. Co. *v.* Ballard, 2 Metc. (Ky.) 165.

[3] Montgomery &c. Asso. *v.* Robinson, 69 Ala. 413, 416, opinion by Brickell, J.

[4] Ex parte Pollard, 40 Ala. 99, opinion by Walker, C. J.

are satisfied."[1] - - - - Again, it has been said: "It is not intended that the body of a legislative enactment shall be a repetition of the title, nor that the title shall be a summary or epitome of the body. The expression in the title, . . . of the actual subject to which the body of the act is devoted, is all that is required. . . . The degree of particularity which must be observed in the expression of the subject in the title of a legislative enactment, must rest largely in legislative discretion. The duty of the general assembly is met, when the title draws attention directly to the subject."[2] - - - - So, it is said by the Supreme Court of the United States: "It is not intended by the constitution of New Jersey that the title to an act should embody a detailed statement, nor be an *index* or *abstract* of its contents. The one general object, the creation of an independent municipality, being expressed in its title, the act in question properly embraced all the means or instrumentalities to be employed in accomplishing the object."[3] - - - - It has been added that "the objection should be serious, and the conflict between the statute and the constitution plain and unmistakable, before the judiciary should disregard a legislative enactment upon the ground that it embraced more than one object, or if but one object, it was not sufficiently expressed in the title."[4] - - - - The Supreme Court of Illinois has said that "the court has leaned rather in favor of the validity of private acts, when the subjects of the acts were multifarious."[5] - - - - The following observation of an eminent writer on constitutional law has been frequently quoted: "The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every *end* and *means* necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable but would actually render legislation impossible."[6] - - - - Again, the New York Court of Appeals have said: "There must be but one subject, but the mode in which the subject is treated, or the reasons which influenced the legislature, could not, and need not be stated in the title, according to the letter and spirit of

[1] Montgomery &c. Assn. *v.* Robinson, 69 Ala. 413, 417, opinion by Brickell, C. J.

[2] Montgomery &c. Assn. *v.* Robinson, 69 Ala. 413, 418, opinion by Brickell, C. J.

[3] Montclair *v.* Ramsdell, 107 U. S. 147, 155, opinion by Harlan, J. See also Otoe County *v.* Baldwin, 111 U. S. 1, 16; Ackley School District *v.* Hall, 113 U. S. 135; Mahomet *v.* Quackenbush, 117 U. S. 508.

[4] Hope *v.* Gainesville, 72 Ga. 246, 250, opinion by Blandford, J.

[5] O'Leary *v.* Cook County, 28 Ill. 534.

[6] Cool. Const. Lim. (4th ed.), 144, § 2. Quoted with approval in Fuller *v.* People, 92 Ill. 182, 185, and in Mahomet *v.* Quackenbush, 117 U. S. 508, 513.

the constitution."[1] - - - - The same court has again said: "The constitution does not require that the title of an act should be the most exact expression of the subject which could be invented. It is enough if it fairly and reasonably announces the subject of the act. . . . A subject is that of which anything may be affirmed or predicated, and if the various parts of this act have respect to or relate to local improvements, the act is not obnoxious to the constitutional objection interposed, and the degree of relationship, if it legitimately tends to the accomplishment of the general purpose, is not material."[2] - - - - In an earlier case in the same court, it was said: "The *different steps* by which the relief is to be brought about are not distinct subjects, but are minor parts of the same general subject. The degree of particularity with which an act is to express its subject is not defined in the constitution and rests in the discretion of the legislature."[3] One of the latest expressions on the subject in the same court is the following: "When the subject is expressed, all matters fairly and reasonably connected with it, and all matters which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title. The title must be such, at least, as fairly to suggest or give a clue to the subject dealt with in the act, and unless it comes up to this standard it falls below the constitutional requirement."[4] - - - - The Supreme Court of Pennsylvania have said that "if the title fairly gives notice of the subject of the act, so as reasonably to lead to an inquiry into the body of the bill, it is all that is necessary."[5] - - - - With equal aptness the same court has said that "the title need not be a complete *index* to the contents of the bill."[6] - - - - At the same time, "it has never been doubted that the subject of proposed legislation must be so expressed in the title of the bill as to give notice of its purpose to the members of the legislature and others specially interested."[7] - - - Again, it was said by the Supreme Court of

[1] Sun Mut. Ins. Co. *v.* Mayor, 8 N. Y. 240, 253, opinion by Gardiner, J.

[2] Re Mayer, 50 N. Y. 504, opinion by Church, C. J.

[3] Brewster *v.* Syracuse, 19 N. Y. 116.

[4] Astor *v.* Arcade R. Co., 113 N. Y. 93, 109, per Earl, J.

[5] Allegheny County Home's Appeal, 77 Pa. St. 77.

[6] Rogers *v.* Manufacturing &c. Co., 109 Pa. St. 109; Dorsey's Appeal, 72 Pa. St. 192, 195; Re Road in Phœnixville, 109 Pa. St. 44, 49.

[7] Re Road in Phœnixville, *supra*; Com. *v.* Green, 58 Pa. St. 226, 233; Dorsey's Appeal, 72 Pa. St. 192; Beckert *v.* Allegheny, 85 Pa. St. 191. In Blood *v.* Mercelliott, 53 Pa. St. 391, "an act to increase the boundaries of Forrest County," which required the addition of new territory, and also provided for a re-location of the county seat, was held to be valid; but while that case has not been expressly overruled, it is obvious from the manner in which it has been subsequently distinguished (Re Road in Phœnix-

Illinois that "it is sufficient that the act is fairly covered by its title. The constitution does not require that all the legal effects of an act, such as *repeals by implication*, should be expressly stated in the title."[1] - - - - The same court has said that its uniform rulings have been that this constitutional prohibition is "construed liberally in favor of the validity of enactments; and the fact that many things of a *diverse nature* are authorized or required to be done is unimportant; provided the doing of them may fairly be regarded as in furtherance of the general subject of the enactment;"[2] and the same may be said of the provisions of a statute which deals with *several branches* of one and the same subject-matter.[3] Accordingly, the question whether an act embraces *more than one subject* is to be determined by considering the *controlling purpose* of the law, and not by considering the various provisions which are enacted for carrying the controlling purpose into effect.[4] In other words, while the *subject* must be expressed, the *adjuncts* to that subject, or the *modus operandi*, need not be.[5] - - - - The Supreme Court of Texas have said that while this provision is mandatory, yet "the most liberal construction has been given by the Supreme Court of this State, in accordance with the general current of authority, to make the whole law constitutional, where the part objected to as infringing this provision of the constitution could be considered as appropriately connected with, or subsidiary to, the main object of the act as expressed in the title."[6] - - - - The same court has also said that, "so long as the provisions are of the same nature, and come legitimately under one general denomination or object, we cannot say that the act is unconstitutional."[7] In a later case the same court, after reviewing the authorities, say: "We deduce from the authorities the following as the principal test of the validity of a statute under this constitutional provision: Does the title fairly give such reasonable notice of the subject-matter of the statute itself as to prevent the mischief intended to be guarded against? If so, the act should be sustained. The reason of the rule not applying to such cases, the rule itself does not apply."[8] - - - - It is said by the Court of Appeals of Mary-

ville, 108 Pa. St. 44, 49; Rogers *v.* Manufacturers &c. Co., *Id.* 109, 111) that it is no longer regarded in that State as sound law; and it should not be so regarded anywhere.

[1] Mix *v.* Illinois &c. R. Co., 116 Ill. 502, 508; *s. c.* 6 Northeast. Rep. 42.

[2] Blake *v.* People, 109 Ill. 504.

[3] Gunter *v.* Dale County, 44 Ala. 639; Ex parte Upshaw, 45 *Id.*. 234.

[4] Bins *v.* Weber, 81 Ill. 288.

[5] Ottawa *v.* People, 48 Ill. 233.

[6] Giddings *v.* San Antonio, 47 Tex. 556.

[7] Austin *v.* Gulf &c. R. Co., 45 Tex. 234, 267.

[8] Stone *v.* Brown, 54 Tex. 330, 344, opinion by Bonner, J.

land that if the several sections of a law "refer to and are *germane* to the same subject-matter, which is described in its title it is considered as embracing but a single subject, and as satisfying the requirements of the constitution in this respect."[1]

§ **611. The Result of the Cases.**—Without quoting further from judicial opinions, we may collect the conclusion from numerous cases that it is not the purpose of the constitutional provision to require details and particulars to be specified in the title, nor the means by which the purposes of the act are to be accomplished; but that it is its purpose to prevent the uniting of different or incongruous subjects in one act, and to require the single subject embraced in each act of the legislature to be fairly and reasonably indicated by its title.[2] Such a constitu-

[1] Mayor *v.* Reitz, 50 Md. 579; County Commissioners *v.* Meekins, 50 Md. 28, 41; Maryland Agricultural College *v.* Keating, 58 Md. 580, 584.

[2] Re Knaust, 101 N. Y. 188; People *v.* Whitlock, 92 N. Y. 191; Re Application of Department of Public Parks, 86 N. Y. 439; Re New York &c. Bridge, 72 N. Y. 527; Mayor &c. *v.* Colgate, 12 N. Y. 146; People *v.* Lawrence, 41 N. Y. 137; Lockhart *v.* Troy, 48 Ala. 579; Blake *v.* People, 109 Ill. 504; State *v.* Daniel, 28 La. An. 38; Rader *v.* Township of Union, 39 N. J. L. 509; Nuendorff *v.* Duryea, 69 N. Y. 557; Central Cross-town R. Co. *v.* Twenty-third Street R. Co., 54 How. Pr. (N. Y.) 168; Freeman *v.* Panama R. Co., 7 Hun (N. Y.), 122; Green *v.* Mayor, R. M. Charlt. (Ga.) 368; Martin *v.* Broach, 6 Ga. 21; Johnson *v.* Higgins, 3 Metc. (Ky.) 566; San Antonio *v.* Gould, 34 Tex. 49; Shoemaker *v.* Harrisburg, 4 Pa. County Ct. 86; Jonesboro *v.* Cairo &c. R. Co., 110 U. S. 192; Neifing *v.* Pontiac, 56 Ill. 172; People *v.* Wright, 70 Ill. 388, 396; People *v.* Brislin, 80 Ill. 423; Guild *v.* Chicago, 82 Ill. 472; Fuller *v.* People, 92 Ill. 182, 185; People *v.* Briggs, 50 N. Y. 553; Re Mayor, 50 N. Y. 504; Brewster *v.* Syracuse, 19 N. Y. 116; Blood *v.* Mercelliott, 53 Pa. St. 391; Firemen's Association *v.* Lounsbury, 21 Ill. 511; Phillips *v.* Albany, 28 Wis. 340; Santo *v.* State, 2 Ia. 209; County Judge *v.* State, 2 Ia. 283; Walker *v.* Caldwell, 4 La. An. 298; Succession of Lanzetti, 9 La. An. 329; Davis *v.* State, 7 Md. 157; Battle *v.* Howard, 13 Tex. 345; Sweet *v.* Buffalo &c. R. Co., 79 N. Y. 293; Carothers *v.* Philadelphia Co., 118 Pa. St. 468; *s. c.* 12 Atl. Rep. 314; David *v.* Portland Water Committee, 14 Or. 98; Carter County *v.* Sinton, 120 U. S. 517; Allegheny County Home's Appeal, 77 Pa. St. 77; Union Passenger Co.'s Appeal, 81 Pa. St. 91. See also Edwards *v.* Police Jury, 39 La. An. 855; People *v.* Gobles, 67 Mich. 475; State *v.* Palmes, 23 Fla. 620; State *v.* Duval County, *Id.* 483; People *v.* Henshaw, 76 Cal. 436; City of Atlanta *v.* R. Co., 80 Ga. 276; Dolese *v.* Pierce, 124 Ill. 140; Jarrard *v.* State, 116 Ind. 98; City of Indianapolis *v.* Huegle, 115 Ind. 581; Sanilac County *v.* Auditor-General, 68 Mich. 659; Graham *v.* Conger, 85 Ky. 582; State *v.* Dubois, 39 La. An. 676; People *v.* Kirsch, 67 Mich. 539; Boyce *v.* Sebring, 66 Mich. 210; Wilcox *v.* Paddock, 65 Mich. 23; Gillett *v.* McLaughlin, 69 Mich. 547; Meyer

tional inhibition does not imply that no act shall have any operation *beyond* what is expressed in the title.[1] And, in general, if the title is not *misleading*, or the subject *disguised*, or *concealed* thereby, it is sufficient.[2]

§ 612. Illustrations: Acts Granting and Amending Special Charters. — The very liberal manner in which the courts have construed the constitutional provisions under consideration, with the view of upholding, as far as possible, defective legislation, will now be illustrated by a class of cases where *special acts* of the legislature were under consideration, creating particular corporations or amending their charters. An act to incorporate a particular *railroad company* need not enumerate or suggest in its title the various powers conferred upon the company, in order to be valid under such a provision; nor is it void because it authorizes the construction of *branches* which are not suggested in the title; nor because it authorizes the purchase of lands, the making of coal beds thereon, the purchase or lease of ferry franchises, etc. In these cases, it is sufficient that all of the subsidiary powers granted are necessary to promote the main object, the building and equipping of the main line of railway. Nor need the name of the railway company, as recited in the title, give the full name of the railway authorized to be constructed. It has been suggested that, if such requirements were imposed upon such special legislation, scarcely a railway charter of any kind could stand. "The 'Illinois Central' gives no accurate idea of the location and extent of that road and its branches; and the 'Chicago and Mississippi' would apply equally to any of the six or seven roads extending from Chicago to the Mississippi river; and the 'Ohio and Mississippi' tends actually to mislead as to the location of that road, for it nowhere touches the State of Ohio or the river having that name." And it has been added: "The names of corporations have ever been arbitrary and fanciful, and they probably ever will be. They most generally, it is true, give some idea of the purposes of the corporation, but necessarily in the most general way."[3] - - - - In like manner it has been held that the right to build branch roads and to expropriate land for the purpose is conferred by a charter which reads

v. Berlandi, 39 Minn. 438; Baker *v.* Prewett, 3 Wash. T. 474, 595. Compare State *v.* Union, 33 N. J. L. 350; Stuart *v.* Kinsella, 14 Minn. 524.

[1] Harrington *v.* Wands, 23 Mich. 385. Compare Washington County *v.* Franklin R. Co., 34 Md. 159.

[2] Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50.

[3] Belleville &c. R. Co. *v.* Gregory, 15 Ill. 20, 28-30, opinion by Caton, J.

"an act to incorporate the Mississippi, Terre-aux-Bœufs and Lake Borgne Railroad Company, and to define its powers and authority."[1] - - - - The charter of a *railway corporation* will not be subject to this constitutional objection from the fact that it authorizes the construction of one or more *extensions* of the principal line even in different directions, provided the extensions are of such a character as not to constitute independent and distinct lines from the main road.[2] - - - - "An act for the *relief*" of a certain railroad company has been held sufficiently broad as a title to include a provision authorizing the *extension* of the road of such company.[3] - - - - An act incorporating a *railroad company* which states, among other objects of the corporation, that of "purchasing and navigating such *steam* or *sailing vessels* as may be proper and convenient to be used in connection with such road,"—is not unconstitutional from the fact that the power conferred in the language quoted is not expressed in its title.[4] - - - - An act, the title of which was "an act to make provisions for the government of the county of New York," contained a provision *repealing* in part a former act which *exempted* the real estate of the New York Hospital from *taxation*. This subject was not foreign to the bill, within the meaning of the constitutional provision above quoted.[5] So "an act to incorporate the Green River Navigation Company," properly embraced the right to charge *tolls* upon the vessels of other owners and imposed on the corporation the duty of keeping its locks and dams in repair, etc.,—these being directly connected with the object expressed in the title, namely, the creation of the particular corporation.[6] A still looser construction of such a constitutional provision has held that, under the title of "an act to incorporate the *bank* of Fulton," a clause is valid authorizing the *joinder* in one action of all *parties* to a note or bill, given to be negotiated or actually negotiated in such bank,[7]—a provision which relates to the general law of procedure. "An act to incorporate the Northwestern University" has been held wide enough as a title to embrace a prohibition against the sale of *spirituous liquors* within four miles of such university, under a penalty to be recovered by the county. The court reasoned that "the object of the charter was to create an institution for the education of young men, and

[1] Mississippi &c. R. Co. *v.* Wooten, 36 La. An. 441, 442.

[2] Ross *v.* Chicago &c. R. Co., 77 Ill. 127. See also Ottawa *v.* People, 48 Ill. 233.

[3] Houston &c. Ry. Co. *v.* Odum, 53 Tex. 343.

[4] Freeman *v.* Panama R. Co., 7 Hun (N. Y.), 122.

[5] People *v.* Commissioners, 47 N. Y. 501, 505.

[6] McReynolds *v.* Smallhouse, 8 Bush (Ky.), 447.

[7] Davis *v.* Bank of Fulton, 31 Ga. 69.

it was competent for the legislature to embrace within it everything which was designed to facilitate that object. Every provision which was intended to promote the well-being of the institution, or its students, was within the proper subject-matter of that law."[1] - - - - Under the title of "an act to incorporate the Firemen's Benevolent Association, and for other purposes," it has been held competent to provide that the agents of all foreign insurance companies doing business in Chicago should pay the asssociation two dollars on every hundred dollars of premiums received by them during a year, — the court saying: "We think the sixth section germane to the objects of the bill and embraced properly in the same subject, the whole of which is sufficiently expressed in the title."[2] - - - - "An act to incorporate the Yellow River Improvement Company," is a title broad enough to include provisions granting to the corporation the power to run, drive, sort and stack logs on the Yellow river, after the improvement thereof, and to charge *tolls* for so doing, — such business having a natural and legitimate connection with the improvement of the river.[3]

§ 613. Act Creating a Corporation, etc., Need not Enumerate Powers Conferred. — An application of this principle, in support of which several adjudications may be collected, is that an act incorporating a company, or amending its charter, need not enumerate in the title all the powers conferred. Thus, an act incorporating a railroad company need not express in its title any of the powers, rights, privileges, or immunities which the charter is intended to confer. It is reasoned that the charter of a private corporation is a contract as between the State and the corporation; and the stipulations, terms, and conditions of a contract are to be looked for in the body of the instrument, not

[1] O'Leary *v.* Cook County, 28 Ill. 534, 538.

[2] Firemen's Benevolent Association *v.* Lounsbury, 21 Ill. 511.

[3] Yellow River Imp. Co. *v.* Arnold, 46 Wis. 214. The Maryland Agricultural College was entitled to $6,000 annually from the State, unless the legislature should at any time enact otherwise. A statute entitled, "An act to make appropriations for the support of the State government for the fiscal year ending on the thirtieth day of September, 1881," appropriated $5,999, and Md. Acts, 1880, ch. 432, with the same title as the foregoing, except that 1882 was substituted for 1881, appropriated $5 to said college. It was held that the acts in question did not violate the constitutional provision that every law shall embrace but one subject, to be described in its title, and that the endowment of the college was reduced to the sums named. Maryland Agricultural College *v.* Keating, 58 Md. 580.

in the title or caption.[1] So, a penalty for running a toll-gate without paying toll, may be included in an act under the title "An act authorizing the construction of plank, macadamized and gravel roads;"[2] and so may provisions for appointment of, and reports by, inspectors of turnpikes.[3] So, the fact that the limit of the taxing power of the State over a railroad company is not expressed or indicated in the title of the act of incorporation, does not render that provision of the charter unconstitutional.[4] So, an act "to establish a charter for the city of Troy," need not enumerate in its title all the powers intended to be conferred upon the corporation.[5]

§ 614. Acts "Incorporating" Railway Companies and Providing for Municipal Aid. — This is illustrated by a collection of cases embracing the decided weight of authority which hold that an act, which by its title simply incorporates a railway company or amends the charter of an existing railway company, may properly embrace in its body a provision authorizing municipal corporations to subscribe for its stock and to issue its bonds therefor;[6] — though there is some recent authority to the effect that such a statute, in so far as it embraces such a provision for municipal aid is void, and that the bonds issued in pursuance of it are void.[7] The Supreme Court of Georgia, in so

[1] Goldsmith *v.* Rome R. Co., 62 Ga. 473.

[2] Hunter *v.* Burnsville Turnp. Co., 56 Ind. 213.

[3] *Ibid.*

[4] Goldsmith *v.* Georgia R. Co., 62 Ga. 485. Compare Goldsmith *v.* Rome R. Co., *Id.* 473.

[5] Lockhart *v.* City of Troy, 48 Ala. 579.

[6] Supervisors *v.* People, 25 Ill. 181 (overruled by People *v.* Hammill (Ill.), 17 N. W. Rep. 799; Phillips *v.* Covington &c. Co., 2 Metc. (Ky.) 219; Mahomet *v.* Quackenbush, 117 U. S. 508; Phillips *v.* Albany, 28 Wis. 340; Marion County Commissioners *v.* Harvey County Commissioners, 26 Kan. 181; Abington *v.* Cabeen, 106 Ill. 200; Hope *v.* Gainesville, 72 Ga. 246; Floyd *v.* Perrin, 30 S. C. 1; *s. c.* 8 S. E. Rep. 14; Whitesides *v.* Neely, 30 S. C. 31; *s. c.* 8 S. E. Rep. 27.

[7] People *v.* Hammill (Ill.), 17 Northeast. Rep. 799; Peck *v.* San Antonio, 51 Tex. 490; disapproving San Antonio *v.* Lane, 32 Tex. 405; and San Antonio *v.* Mehaffy, 96 U. S. 312; Giddings *v.* San Antonio, 47 Tex. 548. In conformity with the weight of authority, as above shown, it has been held that "an act to amend the charter of" a bridge company is not invalid, although it authorizes an *increase* of its *capital stock*, and empowers a particular city to subscribe therefor, and to issue its bonds in payment therefor. Phillips *v.* Covington &c. Co., 2 Metc. (Ky.) 219.

holding, have reasoned that an act cannot be obnoxious to such a constitutional provision, "when it appears from the whole act that the great purpose and object of the legislature was to create a corporation, to lay out and construct a railroad between certain points, and to carry out this object and purpose certain means and instrumentalities were authorized by the act. . . . When it is plain by the act a certain thing is to be done, any instrumentality authorized by the act in aid of, to conduce to, to assist the one great purpose of the act, is not a different subject-matter, but is part of the main subject-matter; it is a part of the 'substantial unity in the statutable object,' and is not unconstitutional;" [1] and this quotation is a fair statement of the views of most of the courts on this subject. Accordingly, it has been held that an act empowering a railroad corporation to *extend its road* through a certain county, *and* the county to *subscribe* to its capital stock, embraces only one object.[2] So, it has been held that a statute *legalizing elections* held in a county, on a question of issuing county bonds to aid certain railroad companies, and authorizing townships, lying on or near a certain railroad, to *subscribe* for its stock and issue bonds therefor, does not conflict with such a constitutional provision.[3] So, an act "in relation to" a particular railroad company, may embrace provisions *validating town bonds* previously, but irregularly issued to such company.[4] Some fluctuations on this particular point appear in the decisions of the Supreme Court of Illinois. Thus, it was held by that court in one case that "an act to amend the charter of the village of Lockport," was not broad enough to embrace a provision legalizing certain appropriations theretofore made by the president and trustees of the village and certain orders drawn by the clerk.[5] Another decision of the same court held that "an act to legalize certain aids heretofore voted and granted to aid in the construction" of a proposed railroad, was not broad enough to include a provision authorizing the *issue of bonds* in liquidation of appropriations voted under a prior act,[6] which act

[1] Hope *v.* Gainesville, 72 Ga. 246, 250.

[2] Baltimore &c. R. Co. *v.* Jefferson County, 29 Fed. Rep. 305.

[3] Unity *v.* Burrage, 103 U. S. 447.

[4] Hardenbergh *v.* Van Keuren, 4 Abb. N. Cas. (N. Y.) 43.

[5] Lockport *v.* Gaylord, 61 Ill. 276.

[6] Middleport *v.* Ætna Life Ins. Co., 82 Ill. 562.

provided for the collection of such appropriations by *taxation* only. Still later, the court expressed itself as "inclined to hold," on the authority of the case last cited, that power could not be given to municipal corporations to subscribe to the stock of a railroad company, in an act the title of which was "an act to amend the charter" of such company.[1]

§ 615. Setting out in Incorporating Act the Entire Constitution of the Company.— "An act to incorporate the Montgomery Mutual Building and Loan Association," has been held not obnoxious to such a constitutional provision, although it embraced in the body of the statute the constitution of the association, consisting of eleven articles declaratory of its objects, defining the rights and liabilities of its members, providing specially for the management, loan or investment of its funds, and prescribing the number, duties and powers of its officers, and although other sections related to the opening of the books for subscriptions to stock, the allotment of shares, the election of officers, etc. Although the conclusion of the court seems perfectly obvious without any discussion,— yet, as this is a type of a good many decisions upon this question, and as this question was evidently pressed upon the court with vigor and very carefully considered, it seems appropriate to quote some of the observations in its opinion. Brickell, C. J., said: "The subject is single — the title with clearness indicates it, though it may not indicate the objects the incorporation, the body politic, is designed to accomplish, nor the powers with which it is to be invested, nor the agency to be employed, nor the mode to be pursued in exercising the powers. These are incidents of necessity pertaining to corporate existence — parts of the general subject expressed in the title.[2] . . . The objection urged to this enactment is very far-reaching, and, if sustained, would sentence to nullity innumerable legislative enactments. When the creation of private corporations rested within legislative province, they were invariably created by special statutes, having titles, declaring the subject to be an incorporation of a particular name and style. Many such enactments, having such titles, were passed at the same session of the general assembly at which this statute was passed. These, though corporate existence under them has been established, corporate powers exercised, property and rights acquired, liabilities incurred, and for fifteen years

[1] Welch *v.* Post, 99 Ill. 471, 474. Compare Mahomet *v.* Quackenbush, 117 U. S. 508, 513, where the authority of this case is questioned.

[2] Citing Sun Mutual Ins. Co. *v.* Mayor, 4 Seld. (N. Y.) 247; Brewster *v.* Syracuse, 19 N. Y. 116.

their validity unquestioned,—if the objection now urged were sustained, would be blotted from the statute book. . . . Building and loan associations or societies have existed so long, their organization as corporations under general laws, or special legislative enactments, had been so frequent, that it may well be doubted, whether a more appropriate title could be selected for a special enactment of incorporation, a title more expressive of the subject of the enactment, than the title given to this statute. The idea at once suggested is, that the purpose of the corporation will be the accumulation of funds for division among the members, the investment of such funds until the appointed period of division, and enabling its members to obtain by anticipation, on such terms as may be prescribed, the proportion to which, on division, it is contemplated they will be entitled to receive. This is the subject of the present enactment, and all the provisions introduced into it, relate immediately to this subject." [1]

§ 616. Acts Relating to Municipal Corporations.—"An act to incorporate the town of Munford," etc., has been held a sufficient title to include a clause making it a misdemeanor to sell or give away spirituous liquor within the corporate limits. [2] "An act relating to Weston Avenue," has been held broad enough to authorize a conveyance by a turnpike company, and the acceptance by the commissioners of a park in the city to which the act refers, of a portion of the turnpike road, and to authorize the commissioners to improve the road as an approach to the park and to make provisions for the improvement. The reason is that the whole act relates solely to the portion of the road specified in the title, and the purpose is confined to that one subject, which is sufficiently expressed in the title. [3] An act "attaching certain territory to the town of Westport, to enable it to take stock in a railroad,"—has been held, not void by reason of failure to comply with such a constitutional provision. [4]

§ 617. Instances of Statutes Embracing more than One Subject.—The following are instances of statutes which have been held *void* because embracing more than one subject. A statute amending the charters of *several cities*; [5] incorporating *two towns* in different parts of the State; [6] incorporating *three distinct corporations*, or reviving by name *three charters* which had become obsolete. [7] So of an act

[1] Montgomery &c. Assn. *v.* Robinson, 69 Ala. 413, 417.

[2] Ex parte Moore, 62 Ala. 471.

[3] People *v.* Banks, 67 N. Y. 568.

[4] Henderson *v.* Jackson County, 2 McCrary C. Ct. (U. S.) 615.

[5] State *v.* Wright, 14 Or. 365.

[6] King *v.* Banks, 61 Ga. 20.

[7] Exp. Connor, 51 Ga. 571.

providing for the expenditure of the non-resident highway taxes, for the improvement of *two State roads*, and for the construction and improvement of *another* State road, — the latter not being expressed in the title. Here it was said by Mr. Justice Cooley: "These objects have certainly no necessary connection, and, being grouped together in one bill, legislators are not only precluded from expressing by their votes, their opinion upon each separately, but they are so united as to invite a combination of interests among the friends of each, in order to secure the success of all, when, perhaps, neither could be passed separately."[1] The same has been held of an act releasing the interest of the State in certain real estate to A. B. C. D. E. & F., and for *other purposes;*[2] and of an act "relating to the M. Boom Corporation;" imposing additional duties upon *another* and separate corporation;[3] "to provide for the incorporation of merchants' mutual insurance companies, and to regulate the business of insurance by merchants and manufacturers' mutual insurance companies," — nor could the act be maintained as to one of its objects and rejected as to the other;[4] "to release the Fishkill and Beekman Plank-road Company from the construction of part of their road, and for *other purposes;*"[5] "to authorize the opening and paving of certain portions of Fifteenth, Sixteenth, and Norris streets;"[6] to authorize a certain railway company "to declare *dividends* quarterly, and to lay additional *tracks* of railway;"[7] "regulating appeals from justices' and police courts, and officers of the quarterly court."[8] So, it was held that an act entitled "an act to tax and regulate" certain named foreign corporations, could not, under such a constitutional inhibition, contain any provision in relation to any *other* foreign corporation.[9] It was held by the Supreme Court of California, in a very doubtful decision, that an act "to promote drainage," which provided for the control of debris from mining operations which raised the natural bed of rivers and caused them to overflow the surrounding country, was void, as containing more than one subject.[10]

[1] People *v.* Denahy, 20 Mich. 350.

[2] Johnston *v.* Spicer, 107 N. Y. 185; 13 Northeast. Rep. 753; 9 Cent. Rep. 566; 11 N. Y. State Rep. 436.

[3] Mississippi &c. Boom Co. *v.* Prince, 34 Minn. 79; 24 N. W. Rep. 361.

[4] Skinner *v.* Wilhelm, 63 Mich. 568; *s. c.* 30 N. W. Rep. 311.

[5] Fishkill *v.* Fishkill &c. Plank-Road Co., 22 Barb. (N. Y.) 634. The first section of this act, which did not relate to "other purposes," was held valid.

[6] Commonwealth *v.* Dickinson, 9 Phila. (Pa.) 561.

[7] West Philadelphia &c. R. Co. *v.* Union &c. R. Co., 9 Phila. (Pa.) 495.

[8] Hind *v.* Rice, 10 Bush (Ky.), 528.

[9] Oregon & Wash. Trust &c. Co. *v.* Rathbun, 5 Sawyer (U. S.), 32.

[10] People *v.* Parks, 58 Cal. 624; Doane *v.* Weil, *Id.* 334, Myrick and Sharpenstein, JJ., dissenting.

§ 618. Instances of Statutes not Embracing more than One Subject, and hence Valid. — "An act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others," is not objectionable as embracing more than one subject. Its object is to provide for a whole class of cases, and remedy an existing evil. The subjects have a natural connection.[1] - - - - Provisions authorizing a State bank to organize a national bank, providing for the sale of the stock owned by the State in such bank, protecting the seminary and school fund, and providing for its safe investment, are properly included in one act.[2] - - - - "An act to revive and amend the act to incorporate the Sugar River Valley Railroad, approved March 29th, 1855, and to authorize certain towns therein named to aid in the construction of said railroad," was not obnoxious to the constitutional inhibition against an act containing more than one subject. The act, in the opinion of the court, embraced but one general subject, and that was the building of a railroad, or the creation of a corporation for that purpose, and providing means for the accomplishment of the object. Dixon, C. J., in giving the opinion of the court, further said: "An act might be passed creating or chartering a company in full, and providing for municipal subscription to its stock, with all their details and particulars, and yet not be obnoxious to constitutional objection on this ground."[3] - - - - "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State," — is not unconstitutional as embracing more than one subject, since its general object is to bring together the legislation concerning the creation and management of railroads.[4] - - - - "An act in relation to mortgages against preferred stock in, and the delivery of goods by railway companies," is not void as embracing more than one object; for the whole title relates to railways.[5] - - - - "An act to regulate the use of water for irrigation," which, in addition to regulating the use of such water, contains a provision settling *priorities of right* in respect of the use of the same, has been held not to embrace two subjects, within the meaning of such a constitutional inhibition.[6] - - - - "An act to provide for the

[1] State v. Miller, 45 Mo. 495.

[2] State v. Bank of the State, 45 Mo. 528.

[3] Phillips v. Albany, 28 Wis. 340, 356.

[4] Toledo &c. R. Co. v. Dunlap, 47 Mich. 456.

[5] Attorney-General v. Joy, 55 Mich. 94.

[6] Golden Canal Co. v. Bright, 8 Colo. 144. In Colorado it is held that "in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a

transmission of letters, packages, and merchandise . . . by means of pneumatic tubes," etc., has been held, to embrace in its title but one subject.[1] - - - - "An act for the redress of injuries arising from the neglect or misconduct of railroad companies, or others," which in its body provides a remedy against *natural persons* as well as against *corporations*, has been held not obnoxious to the objection of relating to more than one subject,[2] — a conclusion which must be regarded as doubtful. - - - - Nor is an act void for duplicity of title and object, from the fact that it provides for the incorporation of mutual fire insurance companies, and also for the repeal of previous acts, which would be *repealed by implication* without express mention.[3] - - - - Nor is "an act for the organization of corporations for works of public improvement and utility," subject to constitutional objection for this reason; since it embraces but one subject, the organization of corporations of a particular class.[4]

§ 619. Instances of Statutes Containing Subjects not Expressed in their Titles. — The following, among many other instances, of statutes which have been held *void* as containing subjects not expressed in their titles, are given: — "An act in relation to *streets* in Union township" was void because it conferred the power to lay out a *park*.[5] So, of a statute "relative to grading, paving, curbing and otherwise improving the Troy Hill *Road* in the City of Allegheny," which contained a provision relating to a *park*, the court holding the statute void as to the latter provision.[6] So, of "an act to restrict the *sale* of personal property in certain cases," which also provided that the *willful destruction* of personal property on which there was an unsatisfied lien should be punishable as a misdemeanor.[7] So of "an act to regulate *marks and brands*," which contained a provision that any

beneficial purpose, has, with the qualification contained in the constitution, a prior right thereto to the extent of such appropriation." Coffin *v.* Left Hand Ditch Co., 6 Colo. 443; Thomas *v.* Guiraud, *Id.* 530. Quoting this language, the court add: "It requires no argument to demonstrate that a general law, intended to fully regulate the use of such water, would, almost of necessity, touch upon the subject of priority of right thereto; while of course the payment of expenses and costs in determining such priority of right, and in regulating such use, is a subject that would naturally be considered." Golden Canal Co. *v.* Bright, 8 Colo. 144, 148.

[1] Astor *v.* New York Arcade Railway Co., 48 Hun (N. Y.), 562.

[2] Chiles *v.* Drake, 2 Metc. (Ky.) 146.

[3] Tolford *v.* Church, 66 Mich. 413; 33 N. W. Rep. 913; 9 West. Rep. 885.

[4] Bridgeford *v.* Hall, 18 La. An. 211.

[5] Rader *v.* Township of Union, 39 N. J. L. 509, 514.

[6] Dewhurst *v.* Allegheny City, 95 Pa. St. 437.

[7] Walker *v.* State, 49 Ala. 329.

person who, with intent to defraud, kills any stock running at large, whether branded, marked, or not, shall, upon conviction, be deemed guilty of *felony*, etc.[1] So of "an act relating to the Ridge Avenue Passenger Railway Co.," *ratifying* the *consolidation* of the company with another company, and *repealing* the provisions in the charters of the two companies so as to release them from the control of the city.[2] So of "an act to facilitate the carriage and transfer of passengers and property by railroad companies," which authorized all railroad companies having a *terminus* on any navigable river bordering on the State, to own for their own use any *water-craft* necessary in carrying across such river any property or passengers transferred on their lines, and provided "that no right shall exist under this act to condemn any real estate for a landing for such water-craft, or for any other purpose," and that the act should apply only to "such railroad companies as own the landing for such water-craft." The title was held *misleading*, and not sufficiently broad to include the proviso.[3] So of "an act authorizing the acquisition of turnpikes, roads, or highways, heretofore or hereafter constructed near or through any borough or township in this commonwealth, upon which tolls are charged the traveling public:" because (1) its title excludes turnpikes in cities, and the body of the act includes them; (2) it is confined to such turnpikes as lie wholly within the bounds of single counties; and (3) the title of the act does not indicate that counties are in any way affected.[4] So of "an act to incorporate the village of F.," in so far as it included provisions for dividing the township of F. and incorporating the portions set off as a new town.[5] So of an act "to consolidate and amend the several acts incorporating the city of B., and for other purposes therein mentioned," but confirming "all the ordinances of the Mayor and City Council of the city of B. heretofore passed, and not in conflict with the constitution," etc.[6] So of "an act to amend" the charter of a city, in so far as it contained provisions legalizing and making valid past proceedings of the corporate authorities which were not authorized by the charter.[7] So of "an act making appropriations for certain expenses of government," in so far as it contained provisions authorizing local taxation to defray a part of the expense of building a bridge.[8] So of "an act for the incorpora-

[1] State *v.* Silver, 9 Nev. 227.

[2] Philadelphia *v.* Ridge Avenue Passenger R. Co., 6 Pa. County Ct. 283.

[3] Thomas *v.* Wabash &c. R. Co., 40 Fed. Rep. 126.

[4] In re Carbondale &c. Road (Pa.), 13 Atl. Rep. 913.

[5] Stuart *v.* Kinsella, 14 Minn. 524. The soundness of this decision is doubtful.

[6] Brieswick *v.* Mayor &c. of Brunswick, 51 Ga. 639. Held void as to the provision recited.

[7] Williamson *v.* Keokuk, 44 Iowa, 88.

[8] People *v.* Chautauqua County, 43 N. Y. 10.

tion of insurance companies, defining their powers and prescribing their duties," in respect of a section which regulates the agencies of *foreign insurance companies* doing business within the State.[1] So also as to "an act to regulate the manner of voting in B. county on questions of tax for subscriptions to railroad companies," containing a clause providing that no tax should be imposed for such purpose upon the property of those residing outside the limits of a certain city, unless the votes of a majority of the voters residing outside such limits should be cast in favor of such subscription.[2] So of "an act to incorporate" a certain railroad company, in so far as it conferred upon the company the power to construct and lease its road, and authorized other railroad companies to accept such lease.[3] A strained and doubtful interpretation of such a constitutional provision has resulted in the conclusion that a statute expressing in its title that its object was to provide a means for the collection of claims for cattle and other stock, etc., by railroads, could not embrace in its body a provision creating an absolute liability on the part of railroad companies for the killing of cattle, which liability did not exist prior to its passage.[4] So of "an act relating to the Mississippi Boom Corporation," in so far as it contained a provision imposing additional duties on another corporation, — in effect amending its charter.[5] So of "an act to repeal certain acts therein named," repealing certain special laws relating to municipal corporations, and then following with affirmative legislation. Such a statute is void, both as to the repealing portion and as to the affirmative portion, because neither is expressed in its title.[6] So of a special act of incorporation, the title of which was "an act to incorporate the Manufacturers' Improvement Company," the body of which expressed the object of the incorporation to be to clear out, improve and render navigable a certain stream and its tributaries. Here, the title expressed in no sense the principal purpose of the act, since the word "manufacturer" gave no clue to it. The whole act was therefore void.[7] So of "an act relating to boroughs in the County of Chester," which repealed certain provisions of a general act entitled "an act regulating boroughs," respecting the proceedings for laying out and opening roads within the boroughs of Chester County, the effect of which was to relieve the property-owners in the

[1] Grubbs *v.* State, 24 Ind. 295.

[2] Kentucky &c. R. Co. *v.* Bourbon, 85 Ky. 98; *s. c.* 2 S. W. Rep. 687.

[3] Camden &c. R. Co. *v.* May's Landing &c. R. Co., 48 N. J. L. 530; 7 Atl. Rep. 523; 4 Cent. Rep. 801.

[4] Savannah &c. R. Co. *v.* Geiger, 21 Fla. 669. This decision is so plainly a judicial aberration that it is scarcely proper to quote it.

[5] Mississippi &c. Boom Co. *v.* Prince, 34 Minn. 79.

[6] People *v.* Mellen, 32 Ill. 181.

[7] Rogers *v.* Manufacturers' &c. Co., 109 Pa. St. 109.

boroughs from the burden of paying damages for roads opened in the boroughs, and to shift that burden upon the county.[1]

§ 620. Instances of Statutes not Subject to the Constitutional Objection. — "An act to provide for the closing of the entrances of the tunnel of the Long Island Railroad Company, in Atlantic Street, in the city of Brooklyn, and restoring said street to its proper grade, and for the relinquishment by said company of its right to use steam power within said city," — has been held not obnoxious to a constitutional provision declaring that "no private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." The single special subject embraced in this act was the provision for changing a steam railroad and tunnel into a surface horse railroad, and the mere fact that the owners of the steam railroad and franchise were compensated for surrendering it, and that the statute provided for the raising of the funds to make the compensation did not bring it within the inhibition. Moreover, the title of the act was regarded as sufficiently expressing the object, within the spirit and meaning of the constitutional restriction. "This constitutional restriction," said the court, "does not require that the title of an act shall specify all its provisions."[2] - - - - "An act requiring *railroad corporations*, or other persons operating and controlling railroads, to *fence their right of way* and railroad track, and to construct barriers and cattle guards at certain public road and highway crossings, and to maintain and keep the same in repair, and prescribing remedies and penalties for failing to do so," has been held sufficiently broad to embrace a section providing that gates at private farm railroad crossings shall be constructed and maintained by the land-owners.[3] - - - - "An act concerning *drainage*" constitutionally embraces legislation authorizing a board of *drainage commissioners*.[4] The provisions of a body of revised laws under a title called "Code of Civil Practice," subdivision "Executions," pointing out the *duties of officers* of corporations in regard to the payment of judgments against a corporation, and declaring the consequences to the officers personally of a failure to comply with the requirements of the law, are "properly connected with the subject and title of the enactment of which they form part."[5] - - "An act to provide compensation to the owners of animals killed or in-

[1] Re Road in Phœnixville, 109 Pa. St. 44.

[2] People *v.* Lawrence, 41 N. Y. 137, 139. See also People *v.* McCann, 16 N. Y. 58; Conner *v.* Mayor, 1 Seld. (N. Y.) 285.

[3] Hunt *v.* Lake Shore &c. R. Co., 112 Ind. 69, 79; *s. c.* 13 Northeast. Rep. 263; 11 West. Rep. 107.

[4] Ross *v.* Davis, 97 Ind. 79; Wishmier *v.* State, *Id.* 160.

[5] Porter *v.* Thomson, 22 Iowa, 391.

jured by the cars, locomotives, or other carriages of any railroad companies in this State," may properly embrace an *exception* in the case of such railroads as are suitably fenced.[1] - - - - "An act to regulate public *warehouses*, and the warehousing and inspection of grain, and to give effect to article 13 of the constitution of this State," —has been held broad enough to include a section prescribing the penalty for issuing warehouse receipts for any property not actually in store, or for issuing *fraudulent receipts*, or for not canceling receipts under certain circumstances.[2] - - - - "An act relating to the liability of railroads for damages by fire" is a sufficient title to include a provision that, when it is established that the fire was set out by the operation of the railroad, it shall be *prima facie* evidence of negligence on the part of the company, and that in an action for damages plaintiff's contributory negligence shall be considered in determining his right of recovery.[3] - - - - "An act in relation to a portion of the *submerged lands* and Lake Park grounds lying along and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago," has been held sufficiently expressive as a title to include provisions giving the city the fee to certain partially submerged lands, with authority to sell the same, and giving the fee of certain other submerged lands to a railroad company, with the right to maintain docks and wharves thereon.[4] - - - - "An act for the benefit of the Louisville and Oldham Turnpike Road Company," authorizes the company to borrow money, and to execute mortgages to secure its payment; the second section gives the directors power to sell the road, right of way, etc., and apply the proceeds to the payment of debts; the third section authorizes the chancellor to sell the road, etc., upon the application of a creditor; and the fourth section subrogates the purchaser to the rights and powers of the company. All this relates to but one subject, and that is fully expressed in the title.[5] - - - - The subject of an act entitled

[1] Madison &c. R. Co. *v.* Whiteneck, 8 Ind. 217.

[2] Sykes *v.* People, 127 Ill. 117; *s. c.* 19 N. E. Rep. 705.

[3] Missouri &c. R. Co. *v.* Merrill, 40 Kan. 404; *s. c.* 19 Pac. Rep. 793.

[4] State *v.* Illinois Central R. Co., 33 Fed. Rep. 730, opinion by Harlan, J. Acts with the following titles have been held not within such a constitutional inhibition: "To enable the United Companies to improve lands under water at Kill von Kull and other places:" Hoboken *v.* Pennsylvania R. Co., 124 U. S. 656; *s. c.* 8 Sup. Ct Rep. 643; "to legalize the issuing of bonds,"—the object being to raise money to pay bounty to volunteers to serve in time of war: Coffman *v.* Keightly, 24 Ind. 509; Board of Commissioners *v.* Bearss, 25 Ind. 110; "for the relief of the creditors of the Lockport & Niagara Falls Railroad Company:" Mosier *v.* Hilton, 15 Barb. (N. Y.) 657.

[5] Louisville &c. Co. *v.* Ballard, 2 Metc. Ky. 165.

"An act to provide for the relief of the city of Rochester, and the New York Central and Hudson River Railroad Company in said city," whose provisions relate to the elevation of the company's tracks, and the closing, widening and changing the grade of streets when necessary to secure that object, and to the payment of costs and expenses thereof, is single, and sufficiently expressed in the title.[1]

§ 621. **General Acts of Incorporation.** — General acts of incorporation, such as have been considered in a former chapter of this work,[2] may be validly passed under the most general titles, — such as "an act concerning private corporations," — and may embrace within their provisions all matters germane to the subject expressed in their title, without coming in conflict with constitutional provisions such as those under consideration. An act under the title just quoted may embrace within its provisions the entire body of statute law concerning private corporations: the purposes for which they may be formed; the manner of their organization; their powers and duties; the grounds and manner of their dissolution; and in addition thereto, it may contain separate articles devoted to particular classes of corporations, such as insurance companies, railroad companies, and the like. In treating of railroad corporations, it may confer upon them power to condemn land for right of way and to receive subscriptions of municipalities to their stock, — and all this without coming within such a constitutional inhibition.[3]

§ 622. **Illustrations.** — An act "to revise the laws providing for the incorporation of *railroad companies*," does not violate such a constitutional provision, by including the substantial provisions of a former law which imposes a liability upon railroad companies for injuries resulting from neglecting to *fence* their tracks.[4] - - - - "An act to authorize the organization of annuity, safe deposit and trust companies," may properly embrace a provision granting to such corporations the power to act as *guardians* of the estate of insane persons.[5] - - - - "An act to provide for the incorporation of mutual fire insurance com-

[1] Wilson *v.* New York &c. R. Co., 2 N. Y. Supp. 65.

[2] *Ante*, § 132 *et seq.*

[3] Marion County Comm'rs *v.* Harvey County Comm'rs, 26 Kan. 181.

[4] Continental Improvement Co. *v.* Phelps, 47 Mich. 299.

[5] Minnesota Loan & Trust Co. *v.* Beebe, 40 Minn. 7; *s. c.* 41 N. W. Rep. 232.

panies, and defining their powers and duties," is sufficient to embrace, without particular mention, provisions for *winding up* such companies when they become insolvent, including their examination by the insurance commissioner, the appointment of a receiver, and the assessment of policy-holders to pay liabilities. These are all necessarily incident to the object expressed in the title.[1] - - - - "Provisions prescribing the *examination*, by proper State officers, into the affairs of *insurance companies*, and imposing *penalties* for false representations on such examination, even if made applicable to existing companies, may be included in an act entitled "an act relative to the organization and powers of fire and marine insurance companies transacting business within this State." The court, speaking through Cooley, C. J., say: "It is by no means essential that every end and means necessary or convenient for the accomplishment of the general object, should be either referred to or necessarily indicated by the title. All that can reasonably be required is, that the title shall not be made to cover legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection."[2] - - - - "An act in relation to the *duties* of railroad companies" may properly embrace provisions in respect of the *liabilities* of railroad companies.[3]

§ **623. Acts Purporting to Amend Former Acts.**—It may be stated, as a general proposition, that an act which by its title merely purports to amend a former act, which it recites by its title, is unconstitutional and void, under the provisions which we are considering, if it introduces a subject not germane to the title of the former act. The test by which to determine whether a particular subject can be embraced within the title "an act to amend" a former act, is to consider whether the subject could have been embraced within the original act under its title. "If, under the original title of the act incorporating the company, it would have been competent to confer upon the corporation the powers contained in the amendments, then there can be no doubt of the power to confer them upon it by way of amendment to such act, and under the title of 'an act to amend' the original act, reciting its title. Any additional powers may be given to the com-

[1] Wardle *v.* Townsend, 75 Mich. 385; *s. c.* 42 N. W. 950.

[2] People *v.* State Ins. Co., 19 Mich. 392, 398; citing Indiana &c. R. Co. *v.* Potts, 7 Ind. 681; People *v.* Mahaney, 13 Mich. 495.

[3] McAunich *v.* Mississippi &c. R. Co., 20 Iowa, 338.

pany under an amendatory act, which could have been constitutionally conferred under the original act."[1] It was so held by the Supreme Court of Iowa, in a case where the act under consideration was entitled "an act to amend the act to incorporate the city of Muscatine." The amendatory act extended the limits of the city, and the court held that the law was valid, because this might have been done under the title of the original act.[2] It has also been said that "if the title of the original act is sufficient to embrace the provision in question, it is unnecessary to inquire whether the title of the amendatory act would of itself be sufficient."[3] To illustrate this principle, it has been held that, where the title of the original act was an act to incorporate the Yellow River Improvement Company, an amendatory act whose title merely purported to amend the former act, might embrace a provision empowering the company to run logs and lumber on the river, after the same had been improved by it, and to take tolls therefor. This was not so disconnected with and foreign to the business of improving the river, as to form a new subject which could not be legitimately connected with the business of the improvement company created by the original act, and which might not therefore have been embraced under its title. The court, speaking through Taylor, J., said: "We are of the opinion that the title of the act is not so narrow and restricted as to prevent the conferring of any powers upon the company except such as relate strictly to the improvement of the river and the receiving of tolls for the use of such improvement. It is probably true that, when the title of an act incorporating a company indicates the business to be performed by such company, it would be a violation of the constitutional provision in question to provide in the act for the carrying on of a business by the corporation entirely disconnected with and different from that indicated in the title. The rule is, that any business which is properly connected with the business indicated by the title of the act, may be authorized to be done by the act, without violating the constitutional rule that it shall contain but one subject."[4] An act is not

[1] Yellow River Improvement Co. *v.* Arnold, 46 Wis. 214, 224, opinion by Taylor, J.

[2] Morford *v.* Unger, 8 Ia. 82.

[3] Brandon *v.* State, 16 Ind. 197.

[4] Yellow River Improvement Co. *v.* Arnold, 46 Wis. 214, 225.

necessarily invalid because, being amendatory of a previous act, the title does not expressly so state.[1]

§ **624. Illustrations of the Titles of Amendatory Acts.**— A recent case in New York furnishes an excellent illustration of this. By an act, a corporation had been created whose business was the transmission of letters, packages and merchandise through pneumatic tubes under the streets of New York and Brooklyn. A supplementary act expressing in its title the same purpose contained in its body provisions, which in effect authorized the purposes of the corporation to be changed to the construction and maintenance of an underground steam or horse railroad. It was held that this was so wide a departure from the purpose of the act as expressed in the original title and in the title of the amendatory act, as to render it *void*. Earl, J., said: "A title purporting that an act provides for pneumatic transportation would not be sufficient for an act authorizing the construction and operation of a horse railway or a steam railway; as a title purporting that an act authorizes a line of omnibuses for the transportation of passengers, would not be sufficient for an act authorizing the construction of a railway for the same purpose."[2] - - - - The above proposition is also well illustrated by a case in Pennsylvania, where the title of an act of incorporation of a passenger railway company authorized them to lay their tracks in a number of designated streets. Subsequently, an act was passed entitled "a supplement" [to the first named act] authorizing the company to declare dividends quarterly and to lay additional tracks of railway. It was held that this latter clause did not warrant a provision in the body of the amendatory act, authorizing the company to *extend* its railway into new territory not hitherto authorized to be used.[3] - - - - So, where the title of the original act was, "an act for the incorporation of *manufacturing companies*," and the title of the amendatory act was, "an act to amend section 1, of an act entitled 'an act for the incorporation of manufacturing companies,'" etc., and this amendatory act contained a provision for the incorporation of companies to carry on a *mercantile business*, it was held that it was void.[4] - - - - Another very apt illustration of this principle is furnished by an attempt to amend a statute of Michigan, the title of which was "an act to authorize the formation of corporations for literary and scientific purposes." The third section, in prescribing

[1] Timm *v.* Harrison, 109 Ill. 503.

[2] Astor *v.* Arcade R. Co., 113 N. Y. 93, 109; *s. c.* 20 Northeast. Rep. 594.

[3] Union Passenger R. Co.'s Appeal, 81 Pa. St. 91.

[4] Eaton *v.* Walker, 76 Mich. 579; *s. c.* 43 N. W. Rep. 638.

what should be set forth by each society in the articles, included: "*Third*, The objects for which it is organized, which shall be only for the promotion of literary and scientific pursuits."[1] The second section, in giving general directions for the agreement of incorporation contained a similar reference to this purpose. In 1867 an act was passed to amend section 2 of the above act so as to include "missionary and other benevolent purposes."[2] This amendment made that section read as follows: "SEC. 2. Any number of persons, not less than ten, who shall, by articles of agreement in writing, associate themselves together according to the provisions of this act, for literary or scientific purposes, or both, or for *missionary or other benevolent purposes*, and who shall comply with the provisions of this act, shall, with their successors and assigns, constitute a body politic and corporate," etc. An association was organized under this amendatory act, the objects of which were thus expressed in its articles: "3. The objects for which this corporation is organized, are: to encourage total abstinence from all intoxicating beverages, including cider, cordials, fermented and spirituous liquors of every kind, name and description; to provide relief in case of sickness and accident, and for the burial of deceased members; and to promote, foster and encourage literary pursuits of any kind among its members, including the cultivation of a taste for music and scientific acquirements, and to which end a library shall be procured and maintained." It was held that the amendatory act was not a valid statute; that no action depending upon it could be upheld, but that the original statute must be read as though the amendatory act had never been passed. In delivering the opinion of the court, Campbell, C. J., said: "Our constitution is very positive in its requirement that 'no law shall embrace more than one object, which shall be expressed in its title.'[3] The statute of 1865 is confined by its title expressly to 'literary and scientific purposes.' The third section declares that the objects for which corporations are organized under it 'shall be only for the promotion of literary and scientific pursuits.' The title and this section remain unchanged, and indicate a clear understanding that literary and scientific pursuits are not to be confounded with other matters, however proper and desirable. Our laws have always distinguished between religious purposes and those of general benevolence, as they have between purposes of benevolence and those of a different character. It has been deemed expedient to provide different regulations for all these subjects. No one can hesitate to see that the purpose of the statute of 1867 was to introduce an entirely new

[1] Sess. Laws Mich. 1865, pp. 725, 726.

[2] 1 Sess. Laws Mich. 1867, p. 21.

[3] Citing Const. Mich., art. 4, § 20.

object of legislation foreign to the existing statute, and incapable, by the most liberal construction, of falling within its terms. This being so, the new law could only have the effect of bringing in an amendment outside of the purpose indicated by the title, and inconsistent with section three, which conforms to the title, and which is not amended or repealed. Such an amendment is void, as within the express prohibition of the constitution. It does not seek to add to literary and scientific corporations any new incidental powers not inconsistent with their articles. It treats the whole matter added as a new and independent purpose, not requiring any connection with those mentioned in the title, and absolutely repugnant to the third section, which would necessarily be repealed as to its third subdivision, if the amendment could be upheld."[1] - - - - "An act to amend the several acts in relation to the city of Rochester," has been held large enough as a title to embrace any matter relating to the business and government of that municipality,—the court saying that "when the title of a local or private act expresses the general purpose or object, all matters fairly and reasonably connected with it, and all measures which will facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title." And again: "Where the subject is general, comprehending all the functions of the corporation, provisions in relation to any of them, or necessary, or pertinent to accomplish and carry out any of them, may be, so far as this constitutional clause is concerned, incorporated in the bill. No one can be misled by such a title, and the legislators and people are alike notified of the purpose of the act."[2] - - - - Under "an act to *reorganize* the Medical Society of New Jersey," the *powers* of the former society could be *repealed* and *new ones* conferred.[3] - - - - "An act to amend the charter of" a *railroad company*, may embrace a provision that "actions for *injuries to stock* and other property on said railroad by the company or its agents, must be brought within *six months* after such injury,"—the court saying: "This act relates to but one subject, and that is clearly expressed in the title, and the legislation under it is in reference to the subject-matter of the title, and has a direct connection with it."[4] - - - - "An act to amend an act entitled 'an act to incorporate the Northwestern University,'" validly embraced a provision prohibiting the *sale of ardent spirits* within four miles of the University, under a penalty to be recovered by the county.[5] - - - - An act to amend a certain

[1] People *v.* Father Matthew &c. Society, 41 Mich. 67, 72.

[2] People *v.* Briggs, 50 N. Y. 553; opinion by Church, C. J.

[3] Hill *v.* Morrison, 46 N. J. L. 488.

[4] O'Bannon *v.* Louisville &c. R. Co., 8 Bush (Ky.), 348, 352.

[5] O'Leary *v.* Cook County, 28 Ill. 534.

chapter of the general statutes entitled "an act to provide for the formation of corporations," has been held sufficiently specific to embrace a provision requiring the payment of a *fee* to the Secretary of State of a corporation upon filing its certificate of organization.[1] - - - - "An act to amend an act to create a *commission of arbitration* and award, to define the powers and duties thereof, and to make appropriation to pay the salaries of the judges thereof," which amended an act creating what is usually called a *supreme court commission*, by merely adding another duty to that originally imposed on the so-called commission of arbitration, was not obnoxious to such a constitutional provision.[2] - - - - "An act to amend the charter of a city, changing the office of city attorney from an appointive to an elective office, was held properly to embrace this provision.[3] - - - - "An act to amend the charter" of a certain turnpike company, provided that "the charter of the said turnpike company be and the same is hereby *repealed* as follows, to wit," — providing that the company should be relieved from the provisions of a general statute relating to the election of officers, and prescribing the manner in which the stock owned by the society should be voted. It was held that the subject of this act was sufficiently expressed in the title, the word "repealed" having been used instead of "amended" by an obvious *mistake:* it was an amendment according to legislative intent.[4] - - - - An act to *amend the charter* of the city of New York[5] has been held broad enough to embrace a provision prohibiting aldermen from sitting as judges of Oyer and Terminer and of the Sessions, and providing that the remaining judge in those courts should hold the courts without the aldermen.[6] So, provisions for the *extension* of the *limits* of a city may be embraced under the title "an act to amend the charter of the city of," etc.[7]

§ 625. Void as to Matter not Expressed in Title, though Valid as to the Rest. — On a principle elsewhere more fully stated,[8] it is the constant practice of the courts to declare statutes which contain matters not expressed in their titles, void as to such matters, though valid as to the rest. In such cases

[1] Edwards *v.* Denver &c. R. Co., 13 Colo. 59; *s. c.* 21 Pac. Rep. 1011.

[2] Stone *v.* Brown, 54 Tex. 331, 341.

[3] Powell *v.* Jackson Common Council, 51 Mich. 129; citing Pack *v.* Barton, 47 Mich. 520.

[4] Cassell *v.* Lexington &c. Turnp. Co. (Ky.), 9 S. W. Rep. 502.

[5] The exact language of the title does not appear to be given in the report.

[6] Phillips *v.* Mayor, 1 Hilt. (N. Y.), 483.

[7] Prescott *v.* City of Chicago, 60 Ill. 121.

[8] *Post*, § 658.

the incongruous matter is generally severable from the other matter, within the principle already explained.[1]

§ 626. **Distinctions Depending upon the Use of the Words "Subject" and "Object."** — Most of the constitutional provisions under consideration declare that an act of the legislature shall contain but one "subject" and that that shall be expressed in its title; but some of them use the word "object." A distinction has turned on the substitution of the word "subject" instead of "object." In a case in the Supreme Court of New York it is said: "It must not be overlooked that the constitution demands that the title shall express the *subject*, not the *object*, of the act. It is the matter to which the statute relates and with which it deals, and not what it proposes to do, which is to be found in the title. It is no constitutional objection to a statute, that its title is vague or unmeaning as to its purpose, if it be sufficiently distinct as to the matter to which it refers."[2] In Texas, under a constitutional provision using the word "object," it was said: "It could not have meant that the word 'object' should be understood in the sense of 'provision;' for that would render the title of the act as long as the act itself. Various and numerous provisions may be necessary to accomplish the one general object which an act of the legislature proposes. Nor could it have been intended that no act of legislation should be constitutional which had reference to the accomplishment of more than one ultimate end. For an act having one main or principal object in view, may incidentally affect or be promotive of others; and it would be impossible so to legislate as to prevent this consequence. The intention doubtless was, to prevent embracing in an act, having one ostensible object, provisions having no relevancy to that object, but really designed to effectuate other and wholly different objects, and thus to conceal and disguise the real object proposed by the provisions of an act, under a false or deceptive title."[3] It may be doubted, however, whether any sound distinction can be

[1] Mississippi &c. Boom Co. *v.* Prince, 34 Minn. 79; Dewhurst *v.* Allegheny City, 95 Pa. St. 437.

[2] People *v.* Lawrence, 36 Barb. (N. Y.) 189, 192. Quoted with approval in Stone *v.* Brown, 54 Tex. 330, 341.

[3] Tadlock *v.* Eccles, 20 Tex. 782, 792; *s. c.* 73 Am. Dec. 213, opinion by Wheeler, J.

drawn upon the use of either of these words instead of the other; for it is perceived that those courts, in whose constitutions the word "subject" is used, take the same view of the meaning of the provision as that above stated by the Texas court.

§ **627. Long Practical Construction.** — The maxim *communis error facit jus*, has been, in substance, applied in the solution of this question, and it has been held that a *long practical construction* of an important statute, in which it has been acquiesced in as valid, will bar any mere technical objection to its constitutionality, based on a want of precision in setting forth its purpose in its title. In so holding it was said by Graves, J.: "It is now more than *ten years* since the act was passed and dovetailed into our system of important statutes. The people and the government have acquiesced in it, as a piece of legislation lawfully enacted, and interests of vast magnitude have meanwhile sprung forth and flourished under it. The whole country has acted on the faith that it originated legitimately and constituted a valid statute; and if we were satisfied that the legislature stumbled and overlooked something which a nice regard for the clause referred to would have prompted, we should deem it our duty to yield to the long practical construction and acquiescence, and decline to set up a view which would reach back and overturn the statute, and uproot and destroy an array of interests it would be difficult to either measure or number." [1]

Article IV. Restraints as to the Mode of Passing Laws.

[1] Continental Improvement Co. *v.* Phelps, 47 Mich. 299, 303. As to the extent to which courts can go in the application of the maxim, *communis error facit jus*, see Cole *v.* Skrainka, 37 Mo. App. 427, dissenting opinion.

§ 632. Constitutional Provision Requiring Assent of Two Thirds of each House. — A constitutional provision that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house," was held by Mr. Justice McLean at circuit not to restrict the legislature from creating more than one corporation in the same act; but in his view the legislature might establish an indefinite number of corporations in the same act, as well as a limited number.[1] This view was denied by the Supreme Court of Michigan, and, it being a question of the interpretation of the constitution of that State, the view of the State court prevailed.[2] Such a provision existed in the constitution of New York. It was at first held that it did not apply to *public* corporations, but that it applied only to private corporations, such as banking institutions, etc.[3] But this doctrine was denied and overruled in subsequent cases.[4] In another case two members of the Court of Errors of New York advanced the opinion that this constitutional provision

[1] Falconer *v.* Campbell, 2 McLean (U. S.), 195.

[2] The Michigan Banking Law of 1837 was held to be unconstitutional after many banks had been organized under it and after many rights had thereby become vested, on the ground that it had been enacted in violation of a constitutional provision of that State that "the legislature shall pass no act of incorporation unless with the assent of at least two-thirds of each house." Green *v.* Graves, 1 Dougl. (Mich.) 351; Farmers & Mechanics Bank *v.* Troy City Bank, *Id.* 457. Mr. Justice McLean at circuit twice held the same statute to be valid, — once in his very elaborate judgment in Falconer *v.* Campbell, 2 McLean (U. S.), 195, and again in White *v.* How, 3 McLean (U. S.), 111. But the Supreme Court of Michigan finally declared it unconstitutional and, the Federal court being bound by the State decision in respect of the interpretation of its own constitution, Mr. Justice McLean subsequently in Nessmith *v.* Sheldon, 4 McLean (U. S.), 375, declared the act unconstitutional, and his decision was affirmed on error in 7 How. (U. S.) 812.

[3] People *v.* Morris, 13 Wend. (N. Y.) 325.

[4] In People *v.* Purdy, 2 Hill (N. Y.), 31, 43, the act in question was one taking from the aldermen of the city of New York certain *judicial* powers exercised by them *individually*. Cowen, J., was of opinion that the act did not interfere with any *corporate* powers, and therefore did not require a two-thirds vote for its passage; Nelson, C. J., adhered to his opinion in People *v.* Morris, *supra*, that the constitutional inhibition did not apply to *municipal* corporations; and Bronson, J., dissented. This case was reversed in the Court of Errors, *sub nom.* Purdy *v.* People, 4 Hill (N. Y.), 384, and the doctrine of People *v.* Morris was there finally overthrown. See also DeBow *v.* People, 1 Denio (N. Y.), 9, 12 (overruled in Gifford *v.* Livingston, 2 Denio (N. Y.), 381).

did not reach *private corporations*, such as banks, provided they were created *under general laws* which authorized everybody to form corporations.[1] The struggle finally ended with a decision in the Court for the Correction of Errors, decided by a vote of fifteen members against seven, in which it was resolved, on the authority of the case of Warner *v.* Beers,[2] that the statute was valid and constitutionally enacted, although it may not have received the assent of two-thirds of the members elected to each branch of the legislature, and that the decision in that case was conclusive.[3]

[1] Warner *v.* Beers, 23 Wend. (N. Y.) 103. But this view was thought to be opposed to the subsequent decisions of the Court of Errors. Purdy *v.* People, *supra.* See the observations of Bronson, C. J., in DeBow *v.* People, 1 Denio (N. Y.), 9.

[2] 23 Wend. (N. Y.) 103.

[3] Gifford *v.* Livingstone, 2 Denio (N. Y.), 380, 402. See also Thomas *v.* Dakin, 22 Wend. (N. Y.) 9; Hunt *v.* Van Alstyne, 25 *Id.* 605; Bank of Watertown *v.* Watertown, *Id.* 686; Curtis *v.* Leavitt, 17 Barb. (N. Y.) 309; Palmer *v.* Lawrence, 1 Seld. (N. Y.) 389. *Decisions under obsolete constitutions, special statutes, etc.:* Many decisions in the earlier courts, or in the less authoritative courts, or in cases under obsolete constitutional provisions, or under special and peculiar statutes, have been collected by the writer; but the limits of space allowed to him will not permit a statement of them in detail; nor is it thought that it would be useful to make such a statement. They will be referred to with the greatest brevity, — *indexed,* so to speak. A statute was held not unconstitutional as being a private bill granting to a corporation the right to lay down tracks, — the right already existing, — nor as being an "exclusive privilege," in People *v.* Long Island R. Co., 60 How. Pr. (N. Y.) 395. The charter of the State Bank of Alabama was not unconstitutional, by reason of the fact that the remedy for and against the bank was not reciprocal; that all debtors must be sued in the county in which the bank was, and that the president was authorized by the charter to create a certificate to be used as evidence in its favor: Lyon *v.* State Bank, 1 Stew. (Ala.) 442, 467. The original charter granted to the Bank of Illinois in 1816 was constitutional, the court proceeding upon the view that the power of legislation is inherent in a State legislature, and is plenary, except in so far as the constitution is restrictive upon it: People *v.* Marshall, 6 Ill. 672. The Illinois act of 1835, extending the charter of the same bank, was also constitutional: *Ibid.;* Wilmans *v.* Bank of Illinois, 6 Ill. 667. The proviso to the third section of the Illinois act of 1857, amending the general banking law, was constitutional, although not submitted to a *vote of the people:* Smith *v.* Bryan, 34 Ill. 364. The proviso was "that in presenting notes or bills for payment under this section, the party presenting shall not be required to present or receive payment for each bill separately, but the whole amount presented shall be treated as though it were a single obligation of that amount." This proviso was regarded as merely declaratory of the common law: Reapers' Bank *v.* Wil-

§ 633. Whether Provisions as to Mode of Passing Bills Directory or Mandatory.—In one or two States constitutional provisions as to the mode of passing acts of incorporation are held to be *directory*.[1] Thus, the provision of a State constitution, that, when a bill is presented for an act of incorporation, it shall be continued until another election of members of the assembly shall have taken place, and public notice of the pendency thereof is given, is directory to the assembly, and, in the absence of any clause forbidding the enactment without observing the directions, does not affect the corporators, unless the State itself intervenes.[2] But this is contrary to the general American doctrine. As already seen, constitutional provisions restraining the passage of private special or local laws creating corporations, amending corporate charters, or granting or extending corporate powers and privileges, are almost universally held to be mandatory.[3] We have seen that the same rule prevails, except in two or three States, in respect to constitutional provisions that an act shall embrace but one subject which shall be expressed in its title. The same rule prevails generally in respect of other constitutional directions and requirements concerning the passage of laws.[4]

§ 634. Whether Courts will go Behind the Enrollment.—In considering this question the courts have had to determine, first, whether they would go behind the fact of the enrollment of the bill in the office of the Secretary of State. Some of them, proceeding with a just delicacy in regard to the faith and credit which is to be given to the acts of a co-ordinate branch of the government, have held that they would not look beyond the fact of the signing and enrollment of the bill. The meaning of this is that the *presumption* which springs from the fact of the

lard, 24 Ill. 433; *s. c.* 76 Am. Dec. 755. Compare Bank of Republic *v.* Hamilton, 21 Ill. 53. An act creating a private banking corporation, was not a "bill of a general character," which, under art. 2, § 21, of the former constitution, of Tennessee required the calling of the ayes and noes on its final passage: Ferguson *v.* Miners &c. Bank, 3 Sneed (Tenn.), 609.

[1] Compare *ante*, § 608.

[2] McClinch *v.* Sturgis, 72 Me. 288.

[3] *Ante*, § 573. See a learned note on this question by W. W. Thornton, Esq., in 26 Am. L., Reg. (N. S.,) 304, *n;* also learned note in 85 Am. Dec. 356, discussing the subject at length, with an exhaustive list of authorities.

[4] *Ante*, § 608.

bill being signed and enrolled is *conclusive*, and that the courts will not look either to the journals of the houses of the legislature, or hear any evidence for the purpose of overthrowing that presumption.[1] Other courts have held that it is competent for the courts to go behind the official enrollment and publication of the statute, and look to the journals of the two houses of the legislature for the purpose of ascertaining whether the statute was passed in conformity with the requirements of the constitution, and that they may declare it to be no law if they find that it was not so passed.[2]

§ 635. Presumptions in Favor of Regularity of Passage. — But even under this rule, the courts will indulge in every reasonable *presumption* in support of the validity of an act of the legislature, which has been duly authenticated, enrolled and published. The *publication* of an act in the volume of session laws of the year, verified by the Secretary of State, creates a presumption that it became a law pursuant to constitutional requirements.[3]

[1] Whited *v.* Lewis, 25 La. An. 568; Danielly *v.* Cabiniss, 52 Ga. 211; Territory *v.* Clayton, 5 Utah, 598; 18 Pac. 628 Exp. Wren, 63 Miss. 512 (overruling Brady *v.* West, 50 Miss. 68); Jones *v.* Hutchinson, 43 Ala. 721; Commonwealth *v.* Jackson, 5 Bush (Ky.), 680; Evans *v.* Browne, 30 Ind. 514; Paine *v.* Lake Erie &c. R. Co., 31 Ind. 283; Broadax *v.* Groom, 64 N. C. 244 (private act); Usener *v.* State, 8 Tex. App. 177 (overruled by Hunt *v.* State, 22 Tex. App. 396); People *v.* Commissioners of Highways, 54 N. Y. 276; Ryan *v.* Lynch, 68 Ill. 160. Compare Jordan *v.* Wapello Circ. Ct., 69 Iowa, 177; *s. c.* 28, N. W. Rep. 548.

[2] Hunt *v.* State, 22 Tex. App. 396; (disapproving Blessing *v.* Galveston, 42 Tex. 641; Usener *v.* State, 8 Tex. App. 177); State *v.* Robinson, 20 Neb. 96 (journals made competent evidence by statute); State *v.* Brown, 20 Fla. 407; Brown *v.* Nash, 1 Wy. Ter. 85; Berry *v.* Baltimore &c. R. Co., 41 Md. 446; Post *v.* Supervisors, 105 U. S. 667; Smithee *v.* Garth, 33 Ark. 17; Osburn *v.* Stanley, 5 W. Va. 85; Gardner *v.* The Collector, 6 Wall. (U. S.) 499; Ryan *v.* Lynch, 68 Ill. 160 (statute held not void because not read on three different days in the senate and not passed by a vote of the ayes and noes); Smithee *v.* Campbell, 41 Ark. 471 (statute held void because never formally passed by the senate). It is competent for the Supreme Court of Missouri to examine into the sufficiency of the preliminary proceedings of the general assembly, in order to determine the validity of an amendment of the constitution. State *v.* McBride, 4 Mo. 303. The journals of the houses of the legislature, though not evidence of the meaning of a statute, are admissible to identify a bill referred to in a subsequent act. Southwark Bank *v.* Commonwealth, 27 Pa. St. 446.

[3] Bound *v.* Wisconsin Central R. Co., 45 Wis. 543.

The courts must receive a law, so published, as having been duly passed, unless the contrary is clearly made to appear.[1] In favor of the regularity of the passage of a law, the courts will, if necessary, presume that a motion to reconsider prevailed;[2] that it was duly referred to the appropriate committees;[3] and that it was passed by a majority of all the members elected, where that is the constitutional requirement.[4] They will presume, in the silence of the record, that it received the constitutional majority, where the record shows that it was signed in open session;[5] and that it was read three times on three different days, as required by the constitution,[6] although this involves a presumption that a rule was suspended by the requisite two-thirds vote.[7] It is but a different expression of this rule to say that the courts will not declare that the published statute is not a valid law, from the mere fact that the *journals* of the legislature *fail to show* a *strict observance* of the *formalities* prescribed by the constitution for the enactment of laws.[8] In line with this view, another court has reasoned that it must *clearly appear* that it was *not* enacted.[9]

§ 636. Whether Parol Evidence Admissible on the Question. — One court has even gone so far as to hold that they will not only look merely to the journals of the two houses, but that they will hear other competent evidence, for the purpose of ascertaining whether a law was duly passed.[10] But if this means that the journals of the two houses can be contradicted by parol evidence, it is contrary to all principle; for it sinks the records of a co-ordinate branch of the government to a lower level than that occupied by the records of the judicial courts, or even a constable's return. On the other hand, if it means that the recitals on those records can be varied or explained by parol evidence, it introduces a rule which in many cases is denied in

[1] Hensoldt *v.* Petersburg, 63 Ill. 157.

[2] State *v.* Algood, 87 Tenn. 163; 10 S. W. Rep. 310.

[3] Day Land &c. Co. *v.* State, 68 Tex. 526; *s. c.* 4 S. W. Rep. 865.

[4] People *v.* Chenango, 10 N. Y. 317.

[5] Williams *v.* State, 6 Lea (Tenn.), 549.

[6] State *v.* Illinois Central R. Co., 33 Fed. Rep. 730; Glidewell *v.* Martin, 51 Ark. 559; *s. c.* 11 S. W. Rep. 882.

[7] State *v.* Peterson, 38 Minn. 143; *s. c.* 36 N. W. Rep. 443; Same *v.* Oleson, *Id.* 150; Same *v.* Sannerud, *Id.* 229.

[8] State *v.* Mead, 71 Mo. 266; Blessing *v.* Galveston, 42 Tex. 641.

[9] State *v.* Brown, 20 Fla. 407.

[10] Fowler *v.* Pierce, 2 Cal. 165.

respect of private contracts and writings. It is therefore utterly impossible to uphold the decision above alluded to, holding that an act was void, which was passed on the last day of the session, was presented to the governor on the same day, and purported to have been approved on the same day, on the strength of its being shown by *parol evidence* that it was not approved on that day, but on the next day.[1] The Supreme Court of Ohio have considered this question in a very elaborate opinion by Minshall, J., in which the decisions upon the admissibility of parol evidence to affect the authenticity of a statute, appearing by the journals of the legislature to have been duly passed, are reviewed, and in which the court reaches the conclusion that, out of a multitude of decisions, not one is found in which any court has assumed the office of going behind the proceedings of the legislature, as recorded in the journals required to be kept, for the purpose of ascertaining whether a law has been constitutionally enacted; and the court accordingly hold that the authenticity of a statute cannot be impeached by parol evidence, where it is enrolled and attested as required by the constitution.[2] The Supreme Court of Michigan have reached the same conclusion, and have gone further, and held that the court will not allow parties, interested in nullifying legislative action, to *stipulate* or *agree* or *admit* by their pleadings, that a statute was not properly or constitutionally passed, unless the informality is shown by the printed journals or the certificate of the secretary.[3] It is difficult to understand, on principle, the ruling of the Court of Appeals of New York to the effect that the certificate of the presiding officers of the two houses of the legislature, that *three-fifths* of the members were present at the passage of a bill, may be supplied, by parol evidence, where it is omitted, on the theory that the certificate is only presumptive evidence of the fact.[4]

[1] Fowler *v.* Pierce, 2 Cal. 165. See also Berry *v.* Baltimore &c. R. Co., 41 Md. 446.

[2] State *v.* Smith, 44 Ohio St. 348; *s. c.* 7 Northeast. Rep. 447; 12 Northeast. Rep. 829; 4 West. Rep. 101. To this statement the learned judge should have noted the exception of the California case cited above.

[3] Att.-Gen. *v.* Rice, 64 Mich. 385; *s. c.* 31 N. W. Rep. 203; 26 Am. L. Reg. (N. S.) 299; *s. c. sub. nom.* People *v.* Rice, 7 West. Rep. 642.

[4] People *v.* Chenango, 10 N. Y. 317. The decision is tantamount to holding that parol evidence may be heard for the purpose of sustaining the validity

§ **637. Signed by the Governor, or No Law.** — Where the constitution requires that bills shall be signed by the governor, and especially where he possesses a limited veto power, he is thereby made a part of the legislative department of the government; and this is in analogy to the British constitution, under which the legislature consists of the king, the lords and the commons.[1] In order to the formal passage of a law, the concurrence of the three branches of the legislature, — the governor, the senate and the house of representatives, is therefore usually regarded as necessary. From this it follows that, although a bill may have passed both branches of the legislature, yet unless signed by the governor it is no law.[2]

of a statute. But it should seem that a statute is an instrument of such a solemn character, that its validity, like that of a judgment of a court, ought to be proved by the record only, and that parol evidence ought to cut no figure either in supporting or in overturning it. The better view is that, while the courts may look behind the enrollment, and into the legislative journals, to ascertain whether an act was passed in accordance with constitutional requirements, it cannot act on anything not found in the journals, nor presume that any such requirement has been omitted, unless the fact affirmatively appear in the journals. People *v.* McElroy, 72 Mich. 446; 40 N. W. Rep. 750. When the fact of the *passage* of an act *over the governor's veto* appears from the published journals of the legislature, its validity cannot be questioned because of the failure of the clerk of the house and secretary of the senate to certify to its passage before termination of their official functions. Houston &c. Co. *v.* Odum, 53 Tex. 343. As to *mistakes* in enrolled laws, it seems to be a sound view that if it clearly appear, from all the sources of interpretation, that a provision of a statute was inserted through inadvertence, it will be disregarded. Pond *v.* Maddox, 38 Cal. 572. Compare Jones *v.* Hutchinson, 43 Ala. 721; Walnut *v.* Wade, 103 U. S. 683 (word dropped from title while on its passage); Williams *v.* State, 6 Lea (Tenn.), 549 (mistake in the number of the bill); Dow *v.* Beidelman, 49 Ark. 325; 5 S. W. Rep. 297 (mistake in enrollment discovered after adjournment and corrected); Ayers *v.* Trego, 37 Kan, 240; *s. c.* 15 Pac. Rep. 229 (irregularities of title as shown by house journal); State *v.* Robertson (Kan.), 21 Pac. 382 (discrepancies as shown by house journal — correction of omission not appearing). In each of the cases just cited the statute was upheld. Passage of *amendatory acts:* Morrison *v.* St. Louis &c. R. Co., 96 Mo. 602; 9 S. W. Rep. 626. *Amending bills* on their passage: People *v.* Chenango, 10 N. Y. 317; Smithee *v.* Campbell, 41 Ark. 471. A statute without an *enacting clause* is void. State *v.* Patterson, 98 N. C. 660. Joint resolution not a law: Field *v.* Auditor, 83 Va. 882; *s. c.* 3 S. E. Rep. 707. Declaration of legislature as to *emergency* conclusive: Day Land &c. Co. *v.* State, 68 Tex. 526; 4 S. W. Rep. 865.

[1] 1 Bla. Com., p. 153.

[2] Fowler *v.* Pierce, 2 Cal. 165; Hunt *v.* State, 22 Tex. App. 396; 3 S. W.

§ 638. Constitutional Provisions Requiring Amendments of Charters to be Submitted to a Vote of the People. — Constitutional provisions have existed, during the period when it was supposed to be necessary to restrain the multiplication of banks, prohibiting the legislature from creating banking corporations without submitting the act to a vote of the people. Such was the provisions of the original constitution of Illinois.[1] This provision did not prevent the legislature from amending the general banking law of 1851, without submitting the amendment to a popular vote.[2] On the contrary, the banking law of Wisconsin, which was held to be in the nature and to have the force and effect of a constitutional provision,[3] could not be amended without a vote of the people.[4]

§ 639. That no Law shall Create, Renew or Extend the Charter of More than one Corporation. — The former constitution of Pennsylvania[5] provided that no law should create, renew or extend the charter of more than one corporation. Whether this provision is anything more than in the nature of a direction to the legislature has been doubted, and doubts have been expressed whether the courts have a judicial veto over the legislature, so to speak, which would authorize them to pronounce a law void for the reason that it had been enacted in violation of this provision. It was observed by Black, J.: "It is not asserted that the legislature had no jurisdiction of the subject-matter, or that the law, if carried out, would interfere with any right made inviolable by the constitution, but merely that the two houses of assembly neglected a form of proceeding which the constitution prescribes. The objection goes, not to the nature, and essence, and character of the law itself, but to the behavior and conduct of the legislative bodies who passed it." However this may be, the court construed the provision as meaning that to create, re-

Rep. 233; State *v.* Glenn, 18 Nev. 34. Compare Taylor *v.* Wilson, 17 Neb. 88. Bill signed by the governor by mistake immediately notified to speaker of house and read aloud, and bill held no law: People *v.* Hatch, 19 Ill. 283.

[1] Ill. Const. 1819, art. 10, § 5; Scate's Comp. Ill. Stat. 71.

[2] Smith *v.* Bryan, 34 Ill. 364.

[3] State *v.* Hastings 12 Wis. 47.

[4] Van Steenwyck *v.* Sackett, 17 Wis. 645.

[5] Penn. Const. of 1838, art. 1, § 25.

new or extend a charter, means to make a charter which never existed before, to revive and restore one which has expired, or to increase the time for the existence of one which would otherwise reach its limits at an earlier period.[1]

Article V. Various Other Restraints and Provisions.

§ **643. Objections on the Ground of Delegations of Legislative Power.** — The power to enact laws is a public trust committed by our constitutions, Federal and State, to a particular branch of the government, and it is clear that the body to which it has been delegated cannot cast it off by delegating it to some other body. It is therefore a general maxim of American constitutional law that the legislative power of a State cannot be delegated by the legislature to any other body, except within the limits prescribed or permitted by the constitution.[2] In the

[1] Cleveland *v.* Erie, 27 Pa. St. 380, 388.

[2] Houghton *v.* Austin, 47 Cal. 646; Barto *v.* Himrod, 8 N. Y. 483; Bank &c. *v.* Rome, 18 N. Y. 38; Starin *v.* Genoa, 23 N. Y. 439; Clarke *v.* Rochester, 28 N. Y. 605; Thorne *v.* Cramer, 15 Barb. (N. Y.) 112; Bradley *v.* Baxter, *Id.* 122; Parker *v.* Com., 6 Pa. St. 507; Commonwealth *v.* Judge &c., 8 Pa. St. 391; Commonwealth *v.* Locke, 72 Pa. St. 491 (overruling 6 Pa. St. 507); State *v.* Wilcox, 45 Mo. 458; State *v.* Weatherby, 45 Mo. 17; Rice *v.* Foster, 4 Harr. (Del.) 479; State *v.* Copeland, 3 R. I. 33; Cincinnati &c. R.

view of many courts, this principle forbids that the legislature should enact a law to take effect only upon approval by vote of the people of the State, or of any territorial division or district of the State.[1] But in the view of other courts, it is competent for the legislature to submit to a vote of the people of particular localities the question whether they will adopt particular police regulations,[2] such as regulations suppressing the sale of intoxicating drinks, prohibiting animals from running at large, or the like. Nor does this principle extend so far as to prevent the legislature from delegating to municipal corporations, municipal boards, and other public corporations or *quasi*-corporations, certain portions of the legislative, judicial and even executive power of the State, to be exercised strictly for the purposes of *local government* and administration.[3] In some of the cases

Co. *v.* Clinton, 1 Ohio St. 77; People *v.* Collins, 3 Mich. 343; Santo *v.* State, 2 Ia. 165; Geebrick *v.* State, 5 Ia. 491; State *v.* Beneke, 9 Ia. 203; State *v.* Weir, 33 Ia. 134; State *v.* Pond, 93 Mo. 606; Lammert *v.* Lidwell, 62 Mo. 188; Maize *v.* State, 4 Ind. 342; Meshmeier *v.* State, 11 Ind. 482; Groesch *v.* State, 42 Ind. 547; State *v.* Swisher, 17 Tex. 441; State *v.* Parker, 26 Vt. 357; State *v.* Young, 29 Minn. 551; *s. c.* 9 N. W. Rep. 737; recognized in State *v.* Chicago &c. R. Co., 38 Minn. 281; *s. c.* 37 N. W. Rep. 782, 787; Winters *v.* Hughes, 3 Utah, 443; Brown *v.* Fleischner, 4 Oreg. 132; Boyd *v.* Bryant, 35 Ark. 69; Fell *v.* State, 42 Maryland, 71; State *v.* O'Neill, 24 Wis. 149; Commonwealth *v.* Bennett, 108 Mass. 27.

[1] Exp. Wall., 48 Cal. 279, 313; Lammert *v.* Lidwell, 62 Mo. 188; Santo *v.* State, 2 Iowa, 165; State *v.* Beneke, 9 Iowa, 203; Barto *v.* Himrod, 8 N. Y. 483; State *v.* Copeland, 3 R. I. 33; People *v.* Collins, 3 Mich. 343. Nor can the legislature submit the question of the *repeal* of a law to the decision of the people. Geebrick *v.* State, 5 Iowa, 491; State *v.* Weir, 33 *Id.* 134.

[2] Louisville &c. R. Co. *v.* Davidson, 1 Sneed (Tenn.), 637; State *v.* O'Neill, 24 Wis. 149. The Supreme Court of Wisconsin has taken the view that a law, though affecting the *whole people* of the State, is not invalid because it is enacted to take effect only on approval by a popular vote. The legislature may make such regulations and conditions as it pleases in regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain, such as a vote of the people in favor of a law. Smith *v.* Janesville, 26 Wis. 291.

[3] The common case of the creation of municipal corporations by acts of the legislature, is an instance of this. Another instance is found in a holding that the legislature may delegate to *village boards* the power to grant franchises for the collection of *wharfage* for the use of piers on navigable waters. Farnum *v.* Johnson, 62 Wis. 620. So, it is no objection to the constitutionality of the Illinois statutes providing for *drainage districts*, etc., that the county court is invested with power to find the facts necessary to

cited, the practical impossibility of the legislature discharging this duty in respect of all the railroads in the State, without remaining continuously in session, has been pointed out.[1]

§ 644. **Grounds on which this Question to be Determined.** — But it is clear that the question whether the power is *legislative* in its nature or not, cannot be determined upon the consideration whether its exercise is convenient or practical. Fourteen years ago it was held by the Supreme Court of the United States, in a succession of decisions, that the power was legislative in its nature, and that, if erroneously or oppressively exercised by the legislature, the only remedy was by the people at the polls.[2] But those holdings lead the question into this difficulty, that if it is a legislative power, it cannot be delegated, under the principle above stated, but can only be discharged by the legislature, although in order to discharge it, it is necessary for that body to remain continuously in session. An escape from this conclusion is reached by adopting the conception that it is a legislative power if the legislature sees fit to retain or exercise it, but that it may be regarded as a judicial power for the purpose of being committed by the legislature to permanent commissioners, which shall

the creation of the corporations; for in such a case the legislature, not the court, creates the corporations. Blake *v.* People, 109 Ill. 504; *ante* § 110. Giving the *State board of agriculture* discretion in *issuing licenses* for phosphate mining, is not unconstitutional, as a delegation of the legislative power to the board. Port Royal Min. Co. *v.* Hagood, 30 S. C. 519; *s. c.* 9 S. E. Rep. 686. A statute creating a board of *railroad* and *warehouse commissioners*, and clothing them with the power of determining what are reasonable rates of railway transportation, has been held by several of the State courts not a delegation of legislative power. State *v.* Minneapolis &c. R. Co., 40 Minn. 156; *s. c.* 41 N. W. Rep. 465; State *v.* Chicago &c. R. Co., 38 Minn. 281; *s. c.* 37 N. W. Rep. 782; McWhorter *v.* Pensacola &c. R. Co., 24 Fla. 417; *s. c.* 5 South. Rep. 129; People *v.* Harper, 91 Ill. 357; Georgia Railroad Co. *v.* Smith, 70 Ga. 694; Tilley *v.* Savannah &c. R. Co., 4 Woods (U. S.), 427; *s. c.* 5 Fed. Rep. 656. Compare Stone *v.* Yazoo &c. R. Co., 62 Miss. 607; Stone *v.* Farmers' &c. R. Co., 116 U. S. 307 (where the subject of the delegation of legislative power was not discussed); State *v.* Medical Examiners, 34 Minn. 387; *s. c.* 26 N. W. Rep. 123; Hildreth *v.* Crawford, 65 Iowa 339; *s. c.* 21 N. W. Rep. 667. But see Chicago &c. R. Co. *v.* Minnesota, 134 U. S. 418; *s. c.* 10 Sup. Ct. Rep. 462, 702.

[1] See especially the language of the court in Tilley *v.* Savannah &c. R Co., 4 Woods (U. S.) 427.

[2] Munn *v.* Illinois, 94 U. S. 113; Peik *v.* Railway Co., 94 U. S. 164.

exercise it in proceedings, judicial in their nature, upon *notice* and the *hearing of evidence.* This seems to be the conception of the Supreme Court of the United States in its latest obscure deliverance upon this question, in an opinion by Mr. Justice Blatchford, reversing the Supreme Court of Minnesota in one of the cases before cited.[1] The court there hold that the power, when exercised by such a board as the Railway and Warehouse Commission of the State of Minnesota, must be exercised upon the principles upon which *judicial power* alone can be exercised, that is, upon the giving of notice and the hearing of evidence, — otherwise, it involves the deprivation of property without *due process of law*, and violates the fourteenth amendment to the constitution of the United States. Beyond all question the decision is a sound and wholesome one, in so far as it decides that a railway and warehouse commission must, in fixing the rates to be charged for railway and warehouse service, act judicially, that is, upon notice and the hearing of evidence, and that they cannot by a mere *ex parte* declaration, fix a rate of charges which shall be *conclusive*, and which shall cut off all inquiry as to its reasonableness. But the decision is weakened, not only from the fact that three members of the court dissented, but from the further fact that it was a decision rendered in a mere moot case. According to the statement of the facts in the opinion of the court, given by Mr. Justice Blatchford, there *was* a formal complaint of the rates charged by the railway company; there *was* a notification of that complaint by the commission to the railway company; there *was* a time and place set for a hearing of the matter; the complainant and the railway company *appeared*, the latter by its duly authorized attorney, and, after an investigation, the commission ordered the rate to be changed. There is no suggestion in the opinion of the court that, in this investigation, the railway company was deprived of any right, such as it would have had in an ordinary judicial proceeding in the courts, or even that the court excluded any evidence which it tendered. It should be further stated that the Supreme Court of Minnesota has never held that the commission could proceed *ex parte* and without

[1] Chicago &c. R. Co. *v.* Minnesota, 134 U. S. 418; *s. c.* 10 Sup. Ct. Rep. 462, 702; 41 Alb. L. J. 325.

giving notice to the railway company to be affected, or without the hearing of evidence. In its original opinion upon this question[1] that court holds that the committing of such an office to the railway and warehouse commission is not a delegation of legislative power; and that its decision fixing a rate for a particular railway is conclusive. But, although the act under which the commission proceeds does not provide for the giving of notice and for an opportunity to the railway company to be heard, the Supreme Court of Minnesota nowhere says that the commission can proceed without giving notice or without affording an opportunity to the company to be heard. As the commission did not assume to do this, no such question was before the court.[2] There is no implication in the language employed by the Supreme Court of Minnesota that, under the act, the commission is empowered to proceed *ex parte* and without notice, unless it could be drawn from the use of the words "discretionary" and "administrative." The mere fact that the statute does not provide for the giving of notice and an opportunity to the railway company to be affected to be heard in opposition to a change of rates, is no argument against its validity, unless the highest court of the State, whose statute it is, declares that it authorizes the commission to proceed without notice; and then the statute cannot be declared void for that reason, unless in a case where the commission *have* proceeded without notice. The mere fact that the statute is silent on the question of giving

[1] State *v.* Chicago &c. R. Co., 38 Minn. 281; *s. c.* 37 N. W. Rep. 782.

[2] In the course of its opinion, given by Mitchell, J., the Minnesota court say: "If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. If experience has proved anything in the so-called railroad problem, it is that mere abstract laws against unequal charges are of little or no value; hence modern legislation has usually taken the form of creating boards of commissioners, entrusted with general supervision over railroads. Almost all efficient legislation on the subject is under such commissioners, vested with discretionary administrative powers, more or less extensive. Our legislature has gone a step further than most others, and vested our commission with full power to determine what rates are equal and reasonable in each particular case."

notice and affording the railway company an opportunity to be heard, affords no excuse for its overthrow by a judicial fulmination, especially in a case where the company was notified and was heard. Where such a statute is silent, the implication always is that the tribunal will not violate those principles of common right which are embodied in the American constitutions and in the common law, by proceeding without notice.[1]

§ 645.— Prohibition against the Delegation of Municipal Powers to Special Commissions, Private Corporations, etc.— Provisions from the constitutions of some of the States have been already set out,[2] prohibiting the legislatures from delegating to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, or to perform any municipal function whatever. Such an inhibition does not prevent the legislature from creating a permanent *board of public works* for a particular city, the members of which are to be appointed by the governor with the advice and consent of the senate, charged with duties and endowed with powers relating to the expenditure of city funds, the payment and cancellation of outstanding city warrants, and the making of public improvements. Such board is not a "special commission," but a permanent department of the city government.[3]

§ 646. Further of this Subject.— It has been already pointed out that it is not a delegation of legislative power for the legislature to prescribe the terms and conditions upon which corporations may be organized by the voluntary action of individuals, and to vest in the judicial courts, or in ministerial officers, the duty of deciding whether those terms and conditions have been complied with.[4] We shall further see, in a future chapter, that

[1] Ray Co. *v.* Barr, 57 Mo. 290.

[2] *Ante*, § 583.

[3] Re Senate Bill, 12 Colo. 188; *s. c.* 21 Pac. Rep. 481. Compare Dunn *v.* Wilcox County, 85 Ala. 144; Metropolitan Police Board *v.* Wayne County, 68 Mich. 576.

[4] *Ante*, §§ 36, 37, 110. A statute of Minnesota (Minn. Laws 1883, ch. 73), providing for the incorporation of villages on petition to the judge of the District Court, and empowering the court to act in the premises, etc., has been held unconstitutional in delegating legislative powers to a tribunal not entitled, un-

the power to confer franchises upon corporations of a particular kind, such as gas companies, street railway companies, water supply companies, and the like, is in many cases delegated by the legislature to municipal corporations, and that this delegation of power, when authorized, or in some opinion, when not restrained by the constitution, is upheld.[1]

§ 647. May Grant Exclusive Privileges in the Absence of Constitutional Restraint. — In the absence of any constitutional prohibition, it is a sound conclusion that the legislature of a State has the power to grant an exclusive privilege to a corporation, in consideration of the performance by it of public services. Such legislation is not unconstitutional from the circumstance that it may create what is ordinarily called a *monopoly*.[2] In the absence of any constitutional restraint, the legislature may therefore confer upon a private corporation the exclusive privilege of laying down *gas pipes* and of manufacturing, distributing and vending illuminating gas in a city,[3] or the exclusive privilege of erecting or maintaining a system of *water works* and of supplying the city and its inhabitants with water.[4] Such grants are customarily conferred upon corporations concurrently with their

der the constitution, to exercise them. State *v.* Simons, 32 Minn. 540.

[1] *Post*, Ch. 117. The legislature of Louisiana granted to a company the exclusive privilege of supplying the inhabitants of a city with water, by a charter which provided that nothing therein should be "so construed as to prevent the city council from granting to any person, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own use." It was held, that the power conferred on the city council was not legislative, but administrative, and an ordinance of the city, permitting one to lay pipes for his own use is a license, whose validity in no way depends on the constitution or laws of the United States. New Orleans Water-Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18; *s. c.* 8 S. Ct. Rep. 741. A *condition* in a *legislative grant*, that the grantee should obtain the consent of a third party, before enjoyment, is not a delegation of legislative power, and will not render the act unconstitutional. Morgan *v.* Monmouth Plank-Road Co., 26 N. J. L. 99.

[2] Re Philadelphia &c. R. Co., 6 Whart. (Pa.) 25; State *v.* Milwaukee Gas Light Co., 29 Wis. 454; State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398. *Contra*, Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19. Compare San Francisco *v.* Spring Valley Water Works, 48 Cal. 493, 515.

[3] Louisville Gas Co. *v.* Citizens Gas Co., 115 U. S. 683; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650.

[4] New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674.

creation; but it has been held that, in the absence of any constitutional restraint, an *existing corporation* may receive from the legislature a direct grant of special privileges and franchises.[1] Reasoning upon this subject, the Supreme Court of Pennsylvania have said: "It seems scarcely necessary to say that monopolies are not prohibited by the constitution; and that to abolish them would destroy many of our most useful institutions. Every grant of privileges, so far as it goes, is exclusive; and every exclusive privilege is a monopoly."[2]

§ 648. **Rule under Constitutional Prohibitions.** — By the constitution of Kentucky it is declared that "no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." It is because of this obligation to render public services that the legislature has power to make a grant of exclusive privileges. The power, therefore, does not extend to the making of a grant of exclusive privileges to a merely private corporation which renders no public services. Accordingly, a charter provision allowing such a corporation to charge a greater *rate of interest* than allowed by the general statutes of the State to other persons was held void.[3] In a later case the same court say: "When the citizen undertakes to discharge a duty to the public that the State is under an obligation to discharge, and in consideration for the undertaking an exclusive privilege is granted, the grant is constitutional, because in consideration of public service." The court instances the exclusive right to keep a *ferry*, to construct and operate *highways*, etc., as among the exclusive privileges which the constitution empowers the legisla-

[1] California State Tel. Co. *v.* Alta Tel. Co., *supra.* But see *ante*, § 578.

[2] Re Philadelphia &c. R. Co., 6 Whart. (Pa.) 25, opinion by Gibson, J. Contrary to the principle stated in the text, and on grounds which do not seem to be tenable, it has been reasoned by the Supreme Court of Errors of Connecticut, that the legislature of that State has no power to grant to one party the exclusive right to use the streets of a city for the distribution of illuminating gas. The court say that it is a monopoly, and that, although they have in that State no direct constitutional provision against a monopoly,— yet the whole theory of free government is opposed to such grants. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

[3] Gordon *v.* Winchester &c. Asso., 12 Bush (Ky.), 110; *s. c.* 23 Am. Rep. 713.

ture to grant.[1] In another case in Kentucky, which affords a good illustration of this principle, the State had *improved* the *navigation* of a river, by locks, so as to render its navigation practicable. The keeping of the locks in repair had become a drain on the revenue of the State. The State therefore leased the works to a private corporation, which it authorized to *collect tolls* for the use of the navigation. It was held that the undertaking of the lessee to keep the improvements in repair was a sufficient consideration for the grant of the powers conferred by the legislature, and that the act was not in violation of the provision of the constitution of Kentucky under consideration.[2] But the Court of Appeals of that State were equally divided upon the question whether the above constitutional provision forbade the legislature to grant to a private corporation the exclusive privilege of manufacturing and distributing illuminating gas, for public and private use, in one of the cities of the State, by means of pipes and mains laid under the streets and other public ways of such city. On other grounds, the court reversed a decree refusing an injunction against a newly created gas-light company in such municipality, to restrain an elder company which had received such a grant of exclusive rights from asserting against it the exclusive rights defined in its charter.[3] But this decree was in turn reversed by the Supreme Court of the United States on error, and the court, deeming the question on which the State court was equally divided an important one, proceeded to decide it, by holding, by analogy to previous decisions of the Court of Appeals of Kentucky, that the supplying of gas to a city and its inhabitants for illuminating purposes by means of pipes under the streets, is a franchise belonging to the State, and that the services performed, as the consideration for the grant of such a franchise to a private corporation, are services of a public nature. Such public services, the court hold, authorize the legislature, under the constitution of Kentucky, to grant exclusive privileges.[4]

[1] Com. *v.* Whipps, 80 Ky. 269.

[2] McReynolds *v.* Smallhouse, 8 Bush (Ky.), 447.

[3] Citizens Gas-Light Co. *v.* Louisville Gas Co., 81 Ky. 263.

[4] Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683. See also Com. *v.* Bacon, 13 Bush (Ky.), 210; O'Hara *v.* Lexington &c. R. Co., 1 Dana (Ky.), 232; Gordon *v.* Winches-

Such a grant, being in the nature of a *contract*, provided it is validly made in the first instance, cannot be *impaired* by subsequent legislation granting the same privilege to a newly created corporation.[1]

§ **649. Further of this Subject.** — One court has taken what, after a reconsideration of the subject, seems to the writer a refined distinction, in so far as it holds that, under the constitutional provision[2] that "no title of nobility, hereditary emolument, privilege, or distinction, shall be granted," it is beyond the power of the legislature to grant to a private corporation the exclusive privilege of *making* and *vending* gas within the limits of a city; but that the legislature can, by a charter granted to the city, vest in the city such an exclusive control over its streets and alleys as will enable it to confer upon such a private corporation the exclusive right to use them for laying gas pipes therein.[3] The court draw a distinction between conferring the exclusive privilege of *vending* an article of manufacture which creates a monopoly, contrary to the principles of the common law, and the power which a municipal corporation has over the *use of its highways*, where the care and reparation of them have been exclusively committed to it for the benefit of the public. The decision results in the solecism that what the legislature cannot grant directly it can grant indirectly, by conferring the power upon the municipal corporation to grant it. The gas company claiming the exclusive privilege, did not of course take so absurd a position as to claim that the legislature could create a monopoly in the mere vending of illuminating gas, provided it could be conducted to the purchasers or consumers by any other means than the use of the public streets. The exclusive right to use the public streets for the laying of gas mains therein, was the thing struggled for; and so much of the opinion as dwelt on the inability of the legislature to grant an exclusive privilege to vend illuminating gas was an unnecessary discussion.

ter, 12 Bush (Ky.), 110, 114 (views of Cofer, J.); Com. *v.* Whipps, 80 Ky. 269.

1 New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; Louisville Gas Co. *v.* Citizens Gas Co., 115 U. S. 683.

2 Const. Mo. 1820, art. 12, § 20.

3 St. Louis Gas Light Co. *v.* St. Louis Gas, Fuel &c. Co., 16 Mo. App. 52.

§ 650. Holdings under Other Constitutions. — The constitution of New York (amendment of 1875), forbids the legislature from passing any special act granting to any corporation the right to lay down railway tracks, or any exclusive privilege, immunity or franchise. It has been held that a statute amending the charter of an underground railroad company authorizing it to widen its excavation and to change its motive power, was not the grant of an exclusive privilege within this inhibition.[1] The provision of the present constitution of Illinois[2] against "granting to any corporation, association, or any individual, any special or exclusive privilege, immunity or franchise whatever," has been held to extend only to the passing of special or local laws for such purposes. Accordingly, a statute regulating the public warehouses and the warehousing and inspection of grain, was not in contravention of this constitutional provision.[3] The constitution of Tennessee forbade perpetuities and *monopolies*. The Supreme Court of Tennessee have reasoned, upon ancient authority, that a monopoly is an exclusive right granted to a few, of something which was before of common right. Lord Coke's definition, adopted by the Supreme Court of the United States in a celebrated case,[4] was approved by the Tennessee court. Accordingly, the court held that the right to erect *water-works* in a city involving the privilege of taking up the pavements of the streets, of occupying the streets with water-mains, and of doing such other things as were necessary and proper in completing works for the distribution of water to the inhabitants, was exclusive in the city, until the legislature took it away and conferred it on a private corporation. But the court reasoned that, while it was an exclusive privilege, it was not a monopoly in the sense of the constitutional prohibition. The court accordingly upheld the exclusive right of the private corporation to supply the inhabitants of the city with water.[5] In Louisiana the constitutionality of a statute giving to a private corporation the exclusive

[1] Astor *v.* New York Arcade R. Co., 48 Hun (N. Y.), 562; *s. c.* 1 N. Y. Supp. 174; Bailey *v.* New York, 1 N. Y. Supp. 304. Compare Astor *v.* New York Arcade R. Co., 113 N. Y. 93.

[2] Const. Ill. 1870, art. 4, § 22.

[3] Munn *v.* People, 69 Ill. 80; *s. c.* affirmed, 94 U. S. 113.

[4] Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 707.

[5] Memphis *v.* Memphis Water Co., 5 Heisk. (Tenn.) 495.

right to keep a *slaughter-house*, and also the exclusive control and supervision over the inspection of all animals slaughtered for market in the city of New Orleans, and at the same time prohibiting any other person from the business of purchasing or slaughtering live stock or selling the meats thereof in the markets of the city, was sustained against the objection that it violated a clause of the constitution of that State which provides that all persons shall enjoy the same civil, political and public rights and privileges.[1] It was also sustained in the same court, against the objection that it violated the fourteenth amendment to the constitution of the United States, and that it interfered with commerce among the States;[2] and the decision in this aspect was affirmed by the Supreme Court of the United States.[3]

§ 651. Rights which the Legislature Cannot Bargain Away. — There are, however, rights of so high a nature that the legislature cannot bargain them away. Of this nature is the power of *eminent domain*,[4] the *police power* of the State, to be exercised for the public health and public morals,[5] and the power of *taxation*. These several subjects will be considered in their appropriate places in future chapters.

§ 652. Prohibition against Granting Charters of Incorporation to Churches or Religious Denominations. — The constitution of Virginia contains this prohibition: "The general assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law."[6] This provision was considered by the Court of Appeals of *West Virginia* as not extending so far as to prohibit the legislature of Virginia from incorporating the individuals composing the "executive committee of publication," commonly called "the Presbyterian Committee of Publication," by the name and style of "the

[1] State *v.* Fagan, 22 La. An. 545.

[2] *Ibid.*

[3] Slaughterhouse Cases, 16 Wall. (U. S.) 36.

[4] Cooley Const. Lim. (3d ed.) 525; Hyde Park *v.* Oakwoods Cemetery Association, 119 Ill. 141.

[5] Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746; New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650.

[6] Const. Va. 1867, art. 5, § 17.

Trustees of the Presbyterian Committee of Publication." Such act of incorporation was not deemed an evasion or violation of the above prohibition, because the publication committee was not the church, but merely the hand or servant of the church, so to speak, whose orders it obeyed, and whose work in the matter of distributing the religious literature of the church, it carried on. The court laid needless stress on the fact that the incorporation of this committee did not amount to an incorporation of the church itself.[1] The constitution of Missouri contains this provision: "No religious corporation can be established in this State, except such as may be created under a general law for the purpose only of holding title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries."[2] A corporation organized for the purpose of raising funds for the establishment of Catholic colonies was held not to be within this provision.[3] In considering what is a religious corporation, within the meaning of this statute, the definition given in a New York case that a religious society is "a voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism," etc., has been rejected.[4] On the other hand, it has been said: "It is impossible to consider our constitution as requiring that all these elements and conditions shall enter into the composition of 'a religious corporation,' in order to bring it within the constitutional inhibition. It plainly intends to forbid the creation of any corporation (other than those which are expressly excepted), whose purposes are directly and manifestly ancillary to divine worship or religious teaching. This does not mean that a corporation, created for educational or benevolent purposes, may not hold prayers or impart religious instruction to its pupils or votaries, without a forfeiture of its charter or a violation of the law. A distinction must be observed, between what the members or servants of a corporation may lawfully do, as not being forbidden by any moral or civil precept, and such things

[1] Wilson v. Perry, 29 W. Va. 169, Green, J., dissenting.

[2] Const. Mo., art. 2, § 8.

[3] St. Louis Colonization Association v. Hennessey, 11 Mo. App. 555.

[4] Baptist Church v. Witherell, 3 Paige (N. Y.), 301.

as inhere in the declared purposes and objects for which the corporation was created. 'The leading purpose of an association is the purpose which determines its character.'[1] The constitutional provision under consideration does not, in any degree, abridge religious freedom; but, on the contrary, secures its universality, by withholding special powers and privileges from any one denomination of religionists, or its adjuncts or coadjutors." The court accordingly held that the decree of incorporation was rightly refused, since the corporation would be a religious corporation within the prohibition of the constitution, and a business corporation for pecuniary gain, within the prohibition of the statute. The court further said: "The leading purpose of the intended corporation is, the healing of physical and mental diseases. But all the healing is to be accomplished by the supposed efficacy of a religious tenet. Take away the religious agency, and there is literally nothing left, whereby the corporation may effect its purposes. Religion is its motive power, and quite as essential to all its work, as money to a banking corporation, or a railway cars and locomotives to a railway company. If this does not make it a religious corporation, within the constitutional meaning, then nothing short of a church regularly ordained for public worship can come within the constitutional intent." Finding that it had in it an element of pecuniary profit, the court also held that its incorporation was rightfully refused, under the provisions of a statute of Missouri,[2] which directed that "no association, society or company formed . . . for pecuniary profit in any form . . . shall be incorporated under this article."[3]

§ **653. Corporations in Aid of Rebellion.**— Acts of State legislatures creating corporations for purposes in aid of the late rebellion have been declared *void*. Thus, a statute of South Carolina, incorporating a company for the purpose of exporting produce and importing arms, munitions of war, and other com-

[1] Quoting from Sheren *v.* Mendenhall, 23 Minn. 93.

[2] R. S. Mo. 1879, § 978.

[3] Re St. Louis Institute of Christian Science, 27 Mo. App. 633, opinion by Lewis, P. J. Power of legislature of New Hampshire to authorize *towns*, etc., to make provisions for religious teachers: Hale *v.* Everett, 53 N. H. 9. Very long opinion, in which the subject was evidently intended to be "exhausted."

modities, with power to sue and be sued, and make by-laws not inconsistent with the constitution and laws of the State and the Confederate States, was held to be null and void, as against public policy, and to vest the company with no power to make contracts and sue thereon in its corporate name.[1] On like grounds, a charter granted by one of the so-called Confederate States to a corporation, during the civil war, organized to provide charitably for the Confederate soldiers, was held void.[2]

§ **654. Estoppel to Raise Question of Constitutionality of Act Creating Corporation.**— It has been held that, in an action by an incorporated bank, the debtor of the bank cannot set up the defense that the incorporation of the bank was a violation of the constitution. "After having borrowed the paper of the institution, both public policy and common honesty required that the borrowers should repay it. It is therefore unnecessary to decide whether the incorporation of the bank was a violation of the constitution or not."[3] With a barbaric adhesion to technicality and a low sense of justice, the early Supreme Court of Michigan held that, the general banking law of that State[4] being unconstitutional and void, in so far as it purports to confer corporate powers, no foreclosure could be had of a mortgage executed to a bank organized under its provisions.[5] In the first case in which the same court held this law unconstitutional and void, the question arose on a demurrer to a declaration by a receiver of one of the banking associations thereby created on a promissory note, and the court, on the ground that the banking association had never been incorporated under a formal law, sustained the demurrer and the rascal was allowed to escape the payment of his note.[6] The calamities which were produced by these stupid decisions are within the memory of persons still living. Mr. Justice McLean, in a case before him at circuit, was not able to discover any way out of this difficulty. The action was a bill in equity to make responsible, under the general banking law of

[1] Chicora Company *v.* Crews, 6 S. C. 243.

[2] Trustees of N. C. Endowment Fund *v.* Satchwell, 71 N. C. 111.

[3] Snyder *v.* State Bank, 1 Ill. (Breese) 122.

[4] Mich. Stat. 1837, p. 76.

[5] Hurlbut *v.* Britain, 2 Doug. (Mich.) 191.

[6] Green *v.* Graves, 1 Doug. (Mich.) 351.

Michigan, the directors and stockholders of one of the banks, organized under that law, which had become insolvent. The Supreme Court of Michigan having declared the law unconstitutional, and the Federal court being bound on this question to follow the State court, the learned justice found it "difficult to find any principle on which the obligations of such associations can be enforced." "They have," said he, "no standing within the protection of the law, they having been established in defiance of its prohibitions. As between the individuals concerned, as *particeps criminis*, the law could give no aid; and it is not perceived how an individual can become indebted to the bank, or have a claim on it, without being involved in its illegality." He therefore sustained the demurrer to the bill.[1] The Supreme Court of New York seems to have had the same trouble in respect of the New York banking law of 1838. The court, following its previous decision,[2] held that the act was unconstitutional, and therefore, in an action of assumpsit on a promissory note, by a bank created under the act, gave judgment in favor of the defendant; but the Court of Errors, being of opinion that the act was constitutionally passed, reversed this judgment.[3]

§ 655. Validity of a Statute Allowing a Depositor to Appoint a Person to whom his Deposit shall be Paid after his Death. — It is, of course, no objection to the validity of a statute incorporating a saving fund society, and providing that a book shall be kept at the office in which every depositor shall be at liberty to appoint some person to whom, at his death, his deposit shall be paid, if not otherwise disposed of by will, that it is contrary to the *statute of wills*. As one act of the legislature, both being within its constitutional power, is as good as another, it is no objection to the validity of such a statute that it is contrary to another statute, or that it creates an exception to it.[4]

§ 656. Unconstitutional Law may Operate as a Legislative License. — Where certain persons had been indicted for setting up and carrying on a *lottery*, and they justified under a statute incorporat-

[1] Nessmith *v.* Sheldon, 4 McLean (U. S.), 377. This decision was affirmed, as to the point that it was the duty of the Federal to follow the State court, by the Supreme Court of the United States, on a certificate of division, *sub nom.* Nessmith *v.* Sheldon, 7 How. (U. S.) 712; *ante*, § 632, n. 2.

[2] Debow *v.* People, 1 Denio (N.Y.), 9.

[3] Gifford *v.* Livingstone, 2 Denio (N. Y.), 380.

[4] Knorr's Appeal, 89 Pa. St. 93.

ing them as a company for that purpose, "to raise funds for the common school system of Alabama," the court reached the conclusion that although their act of incorporation was void, as being in conflict with the clause of the constitution which prohibited the legislature from creating corporations by special act, except for municipal purposes, — yet that it might operate as a legislative license to carry on the lottery, and would, in some way or other, estop the State from punishing the corporators for carrying it on. The court had no difficulty in finding that the defendant "acted in good faith and verily believed he was doing what the State, by the statute, clearly authorized him to do."[1]

§ 657. Charters Exempting Corporations from General Laws. — A constitutional provision empowering the legislature to grant "such charters of incorporation as they may deem expedient for the public good," has been held not to empower them to grant a charter of incorporation exempting the corporation from the usury laws of the State, by authorizing it to issue its mortgage bonds, bearing a higher rate of interest than that fixed by general law. Notwithstanding such a charter provision, a bill in equity was entertained, brought by general creditors, the object of which was to confine the bondholders of the corporation to the rate of interest prescribed by the general law of the State, and to subject the surplus to the payment of the debts of the complainants, and a decree granting this relief was affirmed. The bill was well brought as to such of the complainants as were judgment creditors.[2]

§ 658. Statutes may be Valid in Part and Void in Part.— It is a principle of constitutional law that a statute may be valid in part and void in part. If a provision, which is not obnoxious to any constitutional objection, is found, even in the same section, with another provision which is repugnant to the constitution, the provision which is in itself valid must be sustained, unless the two are so united that it must be presumed that the legislature would not have adopted the one without the other.[3] An appropriate case for the application of this principle is where the objects of the statute which are held to be unconstitutional, and those parts of it which are valid, are

[1] Brent *v.* State, 43 Ala. 297. The decision is destitute of either legal or moral sense.

[2] McKinney *v.* Memphis Overton Hotel Co., 12 Heisk. (Tenn.) 104.

[3] Robinson *v.* Bidwell, 22 Cal. 379; People *v.* Nally, 49 Cal. 482; Ex parte Frazer, 54 Cal. 94; Com. *v.* Hitchings, 5 Gray (Mass.), 485.

wholly independent of each other, so that the latter may be carried into effect without reference to the former.[1] When the parts of a statute are so mutually connected and dependent, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not have passed the residue, independently, if some parts are unconstitutional and void, all the provisions, which are thus dependent, conditional, or connected, must fall with them.[2]

§ 659. **Illustrations.** — It has already been seen that if a part of a statute is not expressed in the title, and such part is severable from the rest, it may be declared void, and the rest allowed to stand, under a constitutional provision that an act shall contain but one subject, which shall be expressed in its title.[3] - - - - So, if we refer to some of the principles discussed in the preceding article in regard to restraints upon the enacting of laws, we shall find that where it is ascertained from the journals of the two houses of the legislature that a particular amendment to a bill was not passed in conformity with the requirements of the constitution, but that the bill without the amendment was passed, the courts may, it has been held, sever the amendment from the bill and

[1] Warren *v.* Mayor of Charlestown, 2 Gray (Mass.), 98; French *v.* Teschemaker, 24 Cal. 518, 548; Ex parte Frazer, 54 Cal. 94; St. Louis *v.* St. Louis R. Co., 14 Mo. App. 221; Harris *v.* Niagara County Supervisors, 33 Hun (N. Y.), 279; Tripp *v.* Overocker, 7 Col. 72; Gunnison County Comm'rs *v.* Owen, *Id.* 467; People *v.* Jobs, *Id.* 475; Franklin Co. *v.* Nashville &c. R. Co., 12 Lea (Tenn.), 521; South & North Ala. R. Co. *v.* Morris, 65 Ala. 193; State *v.* Clark, 54 Mo. 17; Rood *v.* McCargar, 49 Cal. 117; Mobile &c. R. Co. *v.* State, 29 Ala. 573; People *v.* Hill, 7 Cal. 97; Lathrop *v.* Mills, 19 Cal. 513; Robinson *v.* Bidwell, 22 Cal. 379; Campbell *v.* Union Bank, 7 Miss. (6 How.) 625; Exchange Bank *v.* Hinds, 3 Ohio St. 1; State *v.* Commissioners, 5 *Id.* 497; Bank of Hamilton *v.* Dudley, 2 Pet. (U. S.) 526; Duer *v.* Small, 4 Blatchf. 263; Mills *v.* Sargent, 36 Cal. 379; Nelson *v.* People, 33 Ill. 390; McCulloch *v.* State, 11 Ind. 424; Santo *v.* State, 2 Iowa, 165; Fisher *v.* McGin, 1 Gray (Mass.), 1; Matter of DeVaucene, 31 How. Pr. (N. Y.) 289; State *v.* Copeland, 3 R. I. 33; State *v.* Snow, 3 R. I. 62.

[2] Warren *v.* Mayor &c., 2 Gray (Mass.), 84; Commonwealth *v.* Clapp, 5 *Id.* 97; Commonwealth *v.* Hitchings, *Id.* 482; Commonwealth *v.* Pomeroy, *Id.* 486; Slauson *v.* Racine, 13 Wis. 398; Campau *v.* Detroit, 14 Mich. 276; San Francisco *v.* Spring Valley Water Works, 48 Cal. 493; State *v.* Pugh, 43 Ohio St. 98; O'Brien *v.* Krenz, 36 Minn. 136; Hinze *v.* People, 92 Ill. 406; Eckhart *v.* State, 5 W. Va. 515.

[3] *Ante*, §625; People *v.* Hall, 8 Colo. 485.

declare the amendment void and the rest of the law valid.[1] - - - - A general act authorizing the formation of corporations may, like any other statute, be valid in part though void in part. For instance, although a statute authorizing the creation of rafting or boom companies, may be invalid in so far as it gives a corporation the right to take exclusive possession of a public navigable stream and bar the rights of all others therein, yet in so far as it merely provides for the formation of corporations with the power to make contracts, it is constitutional and valid.[2] - - - - By analogy to the rule that a statute may be valid in part and void in part, it has been held that an *order of court* made in pursuance of such a legislative authorization, organizing a corporation for the purpose provided by a general law, is valid to the extent of the provisions of that law, and void only so far as it confers powers or privileges in excess of those authorized by the statute.[3] - - - - As an illustration of the principle, it has been held that a portion of a section of a general statute regulating the incorporation of cities, which prescribes the form of *judgment* to be rendered on appeal, may be judicially stricken out as unconstitutional, without impairing the rest or without impairing the rights of suitors.[4] - - - - Applying this principle, it has been held that a statute imposing a tax on telegraphic messages being invalid as to interstate messages, the whole statute must fall.[5]

[1] Berry *v.* Baltimore &c. R. Co., 41 Md. 446.

[2] Ames *v.* Port Huron &c. Co., 6 Mich. 266. The court do not decide that the statute is void even in the particular case.

[3] Heck *v.* Ewen, 76 Tenn. 97.

[4] Allen *v.* Silvers, 22 Ind. 491.

[5] Western Union Tel. Co. *v.* State, 62 Tex. 630. A more difficult question is presented where the court cannot sustain some part of the *constitution itself* without disregarding some other part. The Supreme Court of Texas has been called upon to hold that where there is an irreconcilable conflict between two provisions of a constitution, the more comprehensive and specific provision should control. Gulf &c. R. Co. *v.* Rambolt, 67 Tex. 654. It is scarcely necessary to say that an unconstitutional statute acquires no force by being subsequently incorporated in a *revision* of the statutes. Cock *v.* Stewart, 85 Mo. 575.

CHAPTER XIII.[1]

NATIONAL CORPORATIONS.

§ **665. Definition — Division — Introduction.** — The term national corporation, as used in this chapter, means a corporation existing under a franchise conferred by the national government. A corporation existing under a franchise conferred by a State of the Union is not within the definition. National corporations may be divided with convenience into two classes: 1. Those authorized to act within the States. 2. Those authorized to act within the territories and the District of Columbia. Some corporations fall within both classes. Corporations of the first class, of which national banks and the Pacific Railway Companies are examples, are of general interest, both from the legal ques-

[1] This chapter was written by RUSSELL H. CURTIS, Esq., of the Chicago bar, and was first published in 21 Am. Law Rev. 258. It is now republished, with the consent of its original publishers and of Mr. Curtis, after a revision of the text and notes by him, to bring them down to date.

tions to which they give rise, their wide territorial distribution, their wealth, and the possible consequences of their increase in the future. The capital stock of the more noticeable of them is now worth on the market, in round numbers, $600,000,000.[1] Yet they have received hitherto from writers on legal topics but little attention. They are alluded to in the standard text-books on corporations, but they are not treated as a class of corporations by themselves.

§ 666. **Within the States: Historical Sketch: National Banks.** — It is not difficult to enumerate the principal national corporations which have been authorized to act within the States, for such corporations have been important at almost all periods since the formation of the Federal government. In 1791, the first Congress which sat under the constitution incorporated the earliest bank of the United States.[2] The corporate existence of this bank expired, according to the limitation contained in its charter, in 1811. In 1815 a bill to incorporate a national bank was passed by Congress, but was vetoed by President Madison.[3] In 1816, Congress incorporated the second bank of the United States.[4] Its franchises expired by the limitation contained in its charter, on March 3, 1836. The famous controversy between President Jackson and the bank, over the question of the renewal of its charter, culminated three years earlier, when the President secured a Secretary of the Treasury who would obey his orders to withdraw from the bank the public funds.[5] The opinion held by that secretary concerning the rights of this national corporation, was not, it has been supposed, the least of the causes which led to his appointment to the office of Chief Justice of the United States Supreme Court. In 1841, Congress passed a bill to incorporate a national bank, but it was vetoed by President Tyler.[6] In 1863, Congress for the first time authorized the formation of national banks by

[1] This statement was true at the date when this chapter was first written, namely, January, 1887.

[2] 1 U. S. Stat. 191.

[3] Annals of Congress, 13th Congress, vol. 3, p. 208.

[4] 3 U. S. Stat. 266.

[5] Tyler's Life of Taney, pp. 205, 206.

[6] 10 Congressional Globe, 337.

a general statute.[1] Statutes relating to particular national banks are still passed at every session.

§ 667. Transcontinental Railway Companies. — In 1862, Congress chartered the Union Pacific Railroad Company, with power to construct a railway and telegraph line through the territories, and by the same act of incorporation granted franchises to several State railway corporations; provided for operating the lines of these corporations as one line, and provided for their future consolidation.[2] The consolidation provided for by the charter was effected in part in 1880.[3] The name of the consolidated corporation is the Union Pacific Railway Company. Whatever may be thought of the *status* of the constituent corporations from which this consolidated corporation was formed, it appears to be a national corporation authorized to act within the States of the Union.[4] In 1864, Congress chartered the Northern Pacific Railroad Company, and authorized it to construct a railway and telegraph line from a point in the State of Minnesota, or the State of Wisconsin, west to Puget Sound.[5] The charter contained the provision that no road should be constructed within a State, without the previous consent of the legislature of the State. In 1866, Congress chartered the Atlantic & Pacific Railroad Company, with authority to construct a railway and telegraph line from a point in the State of Missouri to the Pacific ocean.[6] In 1871, Congress chartered the Texas Pacific Railway Company, to construct and operate a railway in part in the States of California and Texas.[7]

§ 668. Maritime Canal Company of Nicaragua. — In 1889 Congress chartered the Maritime Canal Company of Nicaragua, to be a private stock corporation for pecuniary profit, with its principal office in the city of New York, for the purpose of constructing and operating a ship canal between the Atlantic and Pacific ocean, through the territory of the Republics of Nicara-

[1] 12 U. S. Stat. 665.

[2] 12 U. S. Stat. 489.

[3] Poor's Manual for 1882, p. 762.

[4] Pacific Railway Removal Cases, 115 U. S. 1.

[5] 13 U. S. Stat. 365.

[6] 14 U. S. Stat. 292; Santa Clara County *v.* Southern Pac. R., 118 U. S. 394, 398.

[7] 16 U. S. Stat. 573; Supplemental Act, May 2, 1872, 17 Stat. 59.

gua and Costa Rica.[1] It is to be noticed that the principal action of the corporation, the construction and operation of a ship canal, are to be performed exclusively in foreign territory.

§ 669. **Other Corporations Chartered by Congress.**— Congress has chartered corporations not for pecuniary profit. In 1871 Congress chartered the Centennial Board of Finance, as a corporation, to conduct the centennial celebration, in 1876, of the Declaration of American Independence.[2] In 1865, Congress chartered the Freedmen's Savings and Trust Company as a savings bank for emancipated negroes.[3] In 1866, Congress chartered the National Asylum for Disabled Volunteer Soldiers.[4] Congress, in an act to authorize the incorporation of national trades unions in the District of Columbia, provided that corporations formed under the act might establish branches in the States.[5] It is uncertain whether Congress intended to confer the right to establish a branch union, if the State in which it should be located did not consent. Several *quasi*-municipal corporations have been created within State limits by treaty with Indian tribes,[6] though necessarily on soil over which Congress retained jurisdiction.

§ 670. **Formation of National Corporations.** — It will be interesting to examine the question, how national corporations empowered to act within the States, may be formed. The Federal constitution, the people's sole grant of power to their national officers, does not contain any express grant of power to create a

[1] Act of Feb. 20, 1889; 25 U. S. Stat. 673. It is probable that Congress has chartered other corporations for the purpose of building a railway or canal across the Isthmus, but a single example is a sufficient illustration of the class.

[2] Act of June 1, 1872, 17 St. at L. 203.

[3] Act of March 3, 1865; 13 U. S. Stat. 510.

[4] Act of March 21, 1866; 14 U. S. Stat. 10.

[5] 49th Congress, 1st session, chap. 567.

[6] United States *v.* Kagama, 118 U. S. 375; Utah &c. R. *v.* Fisher, 116 U. S. 28; Ex parte Crow Dog, 109 U. S. 556; The Kansas Indians, 5 Wall. (U. S.) 737; Worcester *v.* Georgia, 6 Pet. (U. S.) 515, 561; History of the Creek and Cherokee controversy, 1 Von Holst's Const. Hist. of U. S. (Am. ed.) 433. Notice Ute Reservation in State of Colorado, created in territory of Colorado by treaty of March 2, 1868, (15 U. S. Stat. 619) and alluded to in United States *v.* McBratney, 11 Fed. Rep. 96, note.

corporation, but it contains, as interpreted by the United States Supreme Court, by Congress, and by the acquiescence of the people, an implied grant to Congress of power to create a corporation under certain circumstances. In McCulloch *v.* Maryland, decided in 1819, Chief Justice Marshall laid down the rule, which has been followed ever since, that Congress has power to create a corporation, whenever to do so is an appropriate measure to carry into execution the enumerated powers of that body.[1] It was also decided in that case that the question, whether the creation of a corporation in a particular instance is an appropriate means to accomplish the end sought, is one for the courts to decide; and that the question, whether such measure is expedient is one solely for Congress. Congress has not indicated under which of its express powers it acted when it passed the national banking statutes and the special charters of the several national corporations to which allusion has been made. The banking statutes may perhaps fall under the power of Congress to borrow money, to regulate interstate commerce, to coin money and to regulate the value thereof. The railway statutes may be referred to the power of Congress to establish post roads, to support armies, and to regulate interstate commerce.[2] The purposes for which national corporations may be created in the future are only limited by Marshall's rule that such corporations must be appropriate means to carry into execution the express powers of the national government.

§ 671. Power of Congress to Confer Franchises on them: Exemption from State Control and Taxation.—We have considered in the preceding section the power of Congress to confer the franchise to exist as a corporation. We come now to consider the power of Congress to confer on national corporations other franchises. The franchises, which Congress may confer on national corporations to be exercised within the States of the Union, are probably limited by Marshall's rule, previously stated. Subject to such restriction, no reason is perceived why Congress may not con-

[1] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 400; affirmed in Osborn *v.* United States Bank, 9 Wheat. (U. S.) 738; Farmers' &c. Nat. Bank *v.* Dearing, 91 U. S. 29; Legal Tender Case, 110 U. S. 421.

[2] Const. U. S. art. 1, § 8.

fer franchises upon such corporations, to the same extent as upon natural persons.[1] A national corporation is exempt, in general, from State control, like any corporation or person, in the exercise of all rights held by it under the Federal constitution and statutes.[2] Such corporations are exempt from State control and taxation, so far as State legislation may impair their efficiency as agencies of the national government.[3] The exemption of national corporations from State taxation is not so broad under this rule as it was under the ruling in McCulloch *v.* Maryland[4] and in Osborn *v.* United States Bank,[5] decided when Chief Justice Marshall was on the bench. In those cases such corporations were held to be wholly exempt from State taxation, with the exception of taxation of their real estate, and of the taxation of stockholders residing within the taxing State, upon the stock held by them. In Railroad Company *v.* Peniston[6] the right of a State to tax property within its territory belonging to a railway corporation chartered by Congress was directly in issue, and the court, applying the rule just announced, — that such corporations are taxable in the States in those cases in which their efficiency as Federal agencies is not impaired, — arrived at the further rule that the States may tax the *property*, but not the *operations*, of Federal agents, and decided that the property in question was subject to State taxation. Congress may give the State the

[1] Example of incidental franchise conferred on national corporation: Exemption of national bank from attachment before final judgment, Rev. Stats. U. S. § 5242. Pacific Nat. Bank *v.* Mixter, 124 U. S. 721. The grant of the right of way through public lands, within and without the States, to national, State and territorial railway corporations, has been quite common in the past; also the donation of public land to such corporations.

[2] A franchise conferred by Congress, *e.g.*, to construct a railway across a State, cannot be taxed by a State without the permission of Congress. California *v.* Central Pacific R. Co., 127 U. S. 1. A State statute making it a condition of granting a permit to a sister State corporation to do business in the State, that it agree not to sue in Federal courts is void, because it makes the right to the permit depend on surrender of a right conferred by Federal constitution and statute. Barron *v.* Burnside, 121 U. S. 186.

[3] Farmers' &c., Nat. Bank *v.* Dearing (1875), 91 U. S. 29; National Bank *v.* Commonwealth (1869), 9 Wall. (U. S.) 353; affirmed in Railroad Co. *v.* Peniston, 18 Wall. (U. S) 5; *s. c.* 1 Dill. (U. S.) 314; Thomson *v.* Pacific Railroad, 9 Wall. (U. S.) 579.

[4] 4 Wheat. (U. S.) 316.

[5] 9 Wheat. (U. S.) 738.

[6] 18 Wall. (U. S.) 5; *s. c.* 1 Dill. (U. S.) 314; *accord*, Tel. Co. *v.* Texas, 105 U. S. 460.

right to tax national corporations, and may impose conditions upon such grants.[1] It has done so in the case of the national banks.[2] If a national corporation is a party conducting interstate commerce, Congress may exempt it from State taxation also on that ground. If so engaged, it would be exempt from State taxation, in many cases, under the Federal constitution, without any action by Congress. Interstate commerce conducted by a corporation is entitled to the same protection against State exactions as is given to such commerce conducted by individuals.[3]

§ 672. Power to Confer Right of Eminent Domain within a State. — The national government may exercise the power of *eminent domain* within the States, whenever necessary to carry into execution the powers conferred upon it by the constitution. The case of Kohl *v.* United States,[4] has settled the point. Congress has delegated to national corporations the right of eminent domain, to be exercised within the territories.[5] And it is probable, judging from the settled practice of the States towards corporations created by themselves, that Congress has power to delegate the right of eminent domain to national corporations, to be exercised within a State without its consent. In the case of some of the national railway corporations, all controversy was avoided by provisions in the statutes creating them, forbidding or rendering impossible the construction of roads within the boundaries of a State without its assent. However, in one case at least, the assent of the State was obtained after the construction of the road.[6] The charter of another national railway corporation provides for the condemnation of private property within States, according to the law of the State in which the property is situated.[7]

§ 673. May Confer on Federal Courts Exclusive Jurisdiction of Suits by and Against. — Congress has power, under the

[1] Van Allen *v.* Assessors, 3 Wall. (U. S.) 573.

[2] U. S. Rev. Stat. (ed. of 1878), § 5219.

[3] Gloucester Ferry Co. *v.* Penn, 114 U. S. 196; Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1.

[4] 91 U. S. 367; affirmed U. S. *v.* Jones, 109 U. S. 513.

[5] See several Pacific railway acts cited *supra*.

[6] Recital in Pacific Railroad Removal Cases, 115 U. S. 2.

[7] 16 U. S. Stat. 576, § 10.

constitution, to give the Federal courts jurisdiction of all suits by or against national corporations,[1] and to authorize such corporations to remove to the Federal courts suits brought against them in the State courts.[2] Congress may undoubtedly make the jurisdiction of Federal courts, over suits by or against national corporations, exclusive. The creation of a corporation by Congress is held by the United States Supreme Court, to make any controversy to which such corporation may be a party, a controversy arising under the laws of the United States, and hence a controversy to which the judicial power of the United States extends, irrespective of the citizenship of the parties.[3] And it is settled that Congress may make exclusive the jurisdiction of the Federal courts over all controversies arising under a law of the United States, if not, indeed, over all controversies to which the judicial power of the United States extends.[4] Congress may confer a special jurisdiction on a Federal court to try a special matter, and it has exercised such power with reference to a national corporation. In this instance it prescribed that matters and defendants might be joined in a manner which, but for the special authorization, would have constituted multifariousness.[5]

§ 674. Protection under the Fourteenth Amendment. — Apart from the shelter afforded by other clauses of the Federal constitution, a national corporation is probably protected against unreasonable State exactions by the clause of the fourteenth amendment to the Federal constitution, which prohibits a State from denying to any *person* the equal protection of the laws. It is settled by the decisions of the United States Supreme Court, that a domestic corporation of a State of the Union, is, as to such

[1] Osborn *v.* Bank of United States, 9 Wheat. (U. S.) 738; *accord*, Kennedy *v.* Gibson 8 Wall. (U. S.) 498; Pacific Railroad Removal Cases, 115 U. S. 2.

[2] Pacific Railroad Removal Cases, *supra*.

[3] Osborn *v.* Bank of United States, *supra;* Pacific Railroad Removal Cases, *supra*.

[4] The Moses Taylor, 4 Wall. (U. S.) 411; Gaines *v.* Fuentes, 92 U. S. 10; Claflin *v.* Houseman, Assignee, 93 U. S. 130. These cases by implication overrule Cook *v.* State Nat. Bank, 52 N. Y. 96.

[5] United States *v.* Union Pacific R. Co. (1878), 98 U. S. 569; for report of case below, see 11 Blatch. (U. S.) 385.

State, a *person* within the meaning of this constitutional amendment,[1] although a sister State or foreign corporation is not.[2]

§ 675. Status of National Corporations within the State: Jurisdiction over them. — The *status* of a national corporation, within a State where it acts, depends upon several circumstances. As we have seen, Congress may exempt a national corporation from State control, so far as such control would impair its efficiency as an agency of the Federal government, and so far as such corporation is a party conducting interstate commerce. In New York, a national corporation is by statute defined to be a domestic corporation of the State,[3] and it may sue in the State courts as citizen of the State.[4] In Pennsylvania, it has been held that a national corporation is not a foreign corporation within the meaning of a State statute imposing a tax on foreign corporations.[5] In another case, a Pennsylvania court, acting upon the rule that a corporation has in general a legal existence everywhere within the limits of the sovereignty from which its corporate existence is derived, decided that a national corporation was, in Pennsylvania, neither an alien nor a citizen of another State of the Union, nor a foreign corporation, and hence that a Federal statute, governing the removal of causes from a State to a Federal court by an alien, did not apply to an application for removal by a national corporation.[6] What has been said of the *status* of national corporations does not apply to such corporations chartered by Congress, in the exercise of its powers of local legislation over the territories and the District of Columbia. The jurisdiction of the Federal courts over suits by and against national banks is, by Federal statute of March 3, 1887,[7] the same, except as to suits by the United States and in one or two other specified cases, as the jurisdiction of suits by

[1] Santa Clara County *v.* Southern Pacific R. Co., 118 U. S. 394, 396; Pembina &c. Co. *v.* Pennsylvania, 125 U. S. 181; Minneapolis &c. R. Co. *v.* Beckwith, 129 U. S. 26.

[2] Philadelphia Fire Association *v.* New York, 119 U. S. 110; Pembina &c. Co. *v.* Pennsylvania, 125 U. S. 181, 189.

[3] N. Y. Code of Civil Procedure, § 3343, clause 18.

[4] Market National Bank *v.* Pacific Nat. Bank (1882), 64 How. Pr. (N.Y.) 1.

[5] Commonwealth *v.* Texas &c. R. Co. (1881), 98 Pa. St. 90.

[6] Eby *v.* Northern Pacific R. Co. (1879,) 36 Leg. Int. 164.

[7] U. S. Stat. 1886–7, page 552, ch. 273.

and against banks not organized under a law of the United States. For the purpose of determining the jurisdiction, a national bank is deemed a citizen of the State in which it is located.[1] The power of a national corporation, other than a banking corporation, to sue, and its liability to be sued, are, since the repeal in 1887 of R. S., § 640, without express regulation by general statute. If the United States Supreme Court adheres to its former decision, any suit by or against a national corporation will continue to be deemed a suit involving a Federal question.[2]

§ 676. **Further of this Subject.** — An injunction lies to protect a national corporation in the enjoyment of its franchises.[3] For example, an injunction lies against the agent of a State, threatening to prevent the exercise of such franchises by the execution of void State laws.[4] And a stockholder of such a corporation may have such remedy.[5] A State tax, collected in violation of a Federal franchise, from a stockholder in a national corporation, may be recovered back.[6] The validity of a *de facto* national corporation will be inquired into only in a direct proceeding for that purpose.[7] Congress has provided, in a particular instance by statute, that a national corporation may be compelled to perform its duties by *mandamus*, and the courts have enforced such statute.[8] Congress has also provided in a particular instance for the enforcement of rights against a national corporation by the recovery of treble damages in a civil suit and by the fine and imprisonment of the officers of the corporation in a criminal suit.[9] It has been held on circuit that the property of a national corpo-

[1] *Ibid.*

[2] Consult cases cited *ante*, § 671.

[3] Osborn *v.* Bank of U. S., 9 Wheat. (U. S.) 737; Pelton *v.* Nat. Bank (1879), 101 U. S. 143; Hills *v.* Exchange Bank (1881), 105 U. S. 319.

[4] Osborn *v.* Bank of U. S., *supra.*

[5] Evansville Bank *v.* Britton (1881), 105 U. S. 322.

[6] Supervisors *v.* Stanley, 105 U. S. 305.

[7] Pacific Railroad Removal Cases, 115 U. S. 2. A *quo warranto* suit, by a State against a corporation originally chartered by such State, to test the validity of the merger of such corporation into a national corporation, is a suit arising under the laws of the United States. Ames *v.* Kansas, 111 U. S. 449.

[8] Union Pacific R. Co. *v.* Hall (1875), 91 U. S. 343. Same case below, Hall *v.* Union Pacific R. Co., 3 Dill. (U. S.) 515.

[9] Act of June 20, 1874, 18 St. 111; Pelton *v.* Nat. Bank (1879), 101 U. S. 143; Hills *v.* Exchange Bank (1881), 105 U. S. 319.

ration may be appropriated by a State, within whose limits such property is situated, under the State's right of eminent domain, for the use of a State corporation.[1] In this case, merely a crossing for the line of a State railway corporation was taken. It is probable that the property of a national corporation cannot be appropriated by a State, under any circumstances which would impair the efficiency of such corporation as a Federal agent. Land occupied by a national corporation is in general subject to the criminal jurisdiction of the State where the land lies.[2]

§ 677. **How Dissolved.** — We come now to the consideration of the question, how national corporations may be dissolved. To the present time, the only mode in which such corporations have ceased to exist is by the *expiration* of the terms for which their charters were granted, as was the case with the first and second United States Banks, or by some other method expressly provided for in their charters, as in the case of banks formed under the national banking statutes. The merger of the Union Pacific Railroad Company in the Union Pacific Railway Company was accomplished by a consolidation made in pursuance of the charter of the original company and with its consent. A national corporation may probably be dissolved, like other corporations, by an accepted surrender of its franchise to exist, by a judicial forfeiture of such franchise for non-user or misuser of it,[3] or by the appropriation of such franchise by the Federal government under its rights of eminent domain. It is possible that such a corporation may be dissolved by the operation of some future Federal statute governing bankruptcy. And such a corporation may be dissolved, as before indicated, by any method provided for in its charter.

§ 678. **Power of Congress to Revoke their Charter.** — The question, whether a franchise to be a corporation and such franchises as are given with it, conferred by one Congress without conditions, are irrevocable by a future Congress, is one of speculative interest rather than practical importance, as the charters of

[1] Union Pacific R. Co. *v.* Burlington &c. Co. (1880), 1 McCrary (U. S.), 452.

[2] In re O'Connor, 37 Wis. 379.

[3] *Post*, Ch. 152.

the Pacific Railway Companies and the general statutes providing for the formation of national banks all contain a reservation by Congress of the power to amend them. The question has never been directly raised before the United States Supreme Court. The grant of a franchise to be a corporation is, by our case law, a *contract* between the grantor and the grantee. It is settled law that Congress may in general make contracts which are binding upon the Federal government, and which will be enforced when Congress has provided courts with jurisdiction to enforce them.[1] The question under discussion seems reduced to this: Is the grant of a franchise to be a corporation, or is the grant of any other franchise, subject to the general rule controlling contracts of the government? The consideration that Congress, in the exercise of its functions as a national legislature, may enact laws which impair the obligation of contracts between citizens, as it has perhaps done in the case of the Legal Tender Acts, seems irrelevant.

§ 679. **Effect of Reservation of Right to Amend.**— The question remains, how far a corporate franchise conferred by one Congress, with the reservation of the right to amend, is binding upon a future Congress. Under the constitution, the power to amend the charter of a corporation cannot be used to take away from it property already acquired under its charter, or to deprive it of the fruits, actually reduced to possession, of contracts lawfully made; but, subject to such restrictions, Congress may establish by amendment, whatever it might have prescribed in the original charter.[2] Under this rule, it was held that Congress might require a national corporation to establish a sinking fund, to secure the payment of claims against it, not yet due.[3]

[1] United States *v.* Union Pacific R. Co. (1875), 91 U. S. 72; U. S. *v.* U. P. R. Co., 98 U. S. 559; also *obiter* remarks of court in Sinking Fund Cases (1878), 99 U. S. 700.

[2] Sinking Fund Cases (1878), 99 U. S. 700. Congress has, in a number of cases, declared by statute the forfeiture, by a national railway corporation, of lands previously granted to it by Congress, and often without assigning any reason for the forfeiture,—*e.g.* Act of Feb. 28, 1885; U. S. Stat. 1884–5, p. 337; Act of July, 6, 1886; U. S. Stat. 1885–6, p. 123. See an act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands. March 3, 1887; U. S. Stat. 1886–7, p. 556.

[3] *Ibid.*

§ **680. Not Dissolved by State Action.**— A national corporation cannot be dissolved, or its property confiscated, or its operations seriously crippled, by State action. We have already seen that a national corporation is exempt in general from State control, in the exercise of all rights held by it under the Federal constitution and statutes.[1]

§ **681. Corporations of the Territories.**— What has already been said of the power of Congress to create corporations to act within the States, is true of the power of Congress to create corporations to act within the territories; but it is comparatively unimportant with reference to the latter. By the Federal constitution [2] Congress has general legislative control over the Territories, limited only by the restrictions contained in that instrument, while in respect of the States it exercises merely enumerated powers. Congress has empowered the territorial legislatures to authorize, by general statutes, the formation of corporations within their territorial jurisdictions, and has forbidden such legislatures to grant private charters or special privileges.[3] No such restriction rests upon Congress itself.[4] It has authorized a railway corporation, created by one territory, to extend its line through other territories.[5] Territorial corporations become State corporations upon the admission into the Union of the territory creating them.[6] A corporation created by Congress directly, in pursuance of its powers of local legislation over a territory, or mediately through a territorial legislature, is *prima facie* a corporation of the territory, as a corporation created by a State of the Union is a corporation of the State. A corpora-

[1] *Ante*, § 671.

[2] U. S. Const., art. 4, sec. 3, cl. 2.

[3] U. S. Rev. Stat. (2 ed. 1878), § 1889. Under an act of Congress which gives a territorial legislature general legislative power, such legislature may charter a corporation. Vincennes University *v.* Indiana, 14 How. (U. S.) 268.

[4] Example of congressional legislation relating to territorial corporations: An act to legalize the general laws of the Territory of Dakota for the incorporation of insurance companies and to declare corporations formed under said laws legally incorporated. June 30, 1886; U. S. Stat. 1885–6, p. 107.

[5] U. S. Laws 1877–1878, p. 241, ch. 362.

[6] Kansas Pacific R. Co. *v.* Atchison &c. R. Co., 112 U. S. 414. *Accord*, Vance *v.* Farmers' Bank, 1 Blackf. (Ind.) 80; Bank of Vincennes *v.* State, 1 Blackf. (Ind.) 267.

tion of a territory, unless it holds other franchises than are necessarily implied from its corporate character, has no right to act within the limits of a State without its consent; but if such corporation is permitted by its charter to act generally beyond the territory, it may act by comity within any State, so long as the consent of such State continues.[1] A corporation of a territory cannot sue or be sued in the Federal courts as a national corporation.[2]

§ **682. Corporations of the District of Columbia.**— Congress is given by the constitution general and exclusive legislative power over the District of Columbia.[3] Under the authority thus conferred, Congress may create corporations within the District.[4] It has frequently done so. In one volume of the Statutes at Large,[5] are to be found an act to incorporate a building company, an act to incorporate a railway company, an act to amend the charter of another railway company, and acts to incorporate an inebriate asylum, a cemetery company and an insurance company.[6] The franchises which Congress, acting as a local legislature for the District, may confer on a corporation, beyond the franchise to exercise the powers which a natural person exercises without special authorization, are probably co-extensive with those it may confer on a natural person. Congress probably cannot create a corporation within the District of Columbia and confer upon it power to act within the States without their assent, unless such corporation is, according to Marshall's rule, an appropriate means to carry into execution the enumerated powers of Congress, acting as a national legislature.[7] But Congress may permit a corporation of the District to act within the States, just as any State may permit a domestic corporation

[1] See authorities cited as to powers of corporations of the District of Columbia, *post*, § 682.

[2] Adams Express Co. *v.* Denver &c. R. Co., 16 Fed. Rep. 712.

[3] U. S. Const., art. I., sec. 8, cl. 17.

[4] Such power recognized. Huntington *v.* Savings Bank, 96 U. S. 388; Hadley *v.* Freedman's Savings &c. Co. (1874), 2 Tenn. Ch. 122; Williams *v.* Creswell (1876), 51 Miss. 817; Daly *v.* Nat. Life Ins. Co. (1878), 64 Ind. 1.

[5] 19 U. S. Stat.

[6] Statutes at Large, vol. 18, p. 513, contain "An act to incorporate the Inland and Seaboard Coasting Company of the District of Columbia."

[7] Congress can only confer on the District of Columbia municipal powers. Stontenburgh *v.* Hennick, 129 U. S. 141.

to act beyond the State limits. A corporation acts beyond the territory of the sovereign creating it, only by comity. The States generally permit corporations of the District to act within their limits as foreign corporations.[1] Congress, in the exercise of its powers of local legislation over the District, in 1868 incorporated an insurance company, with permission to it to act within the States with their assent.[2] In 1867 it passed a general incorporation law, authorizing the formation of "national trades unions" within the District, with authority to establish branches within the States.[3] The statute does not expressly provide that a branch union shall only be established within a State, with the express or implied consent of such State; but such is probably the meaning of the statute.

§ 683. State Corporations Holding Federal Franchises. — To avoid misapprehension, it is proper to say that Congress has not chartered any corporation, with power simply to operate telegraph lines within the States. It has conferred, by general statute, upon such State telegraph companies as choose to accept the terms offered, the franchise to construct and operate their lines on all post routes, which include all railways, public roads and streets in the country. These State corporations, although they are made agents of the national government and have important powers confided to them to be exercised in all parts of the union, are not within the scope of this chapter.[4] A State corporation holding a patent right is not a national corporation.[5]

[1] Hadley *v.* Freedman's Trust Co., 2 Tenn. Ch. 122; Daly *v.* Nat. Life Ins. Co., 64 Ind. 1; Williams *v.* Creswell, 51 Miss. 817.

[2] 15 U. S. Stat. 184.

[3] Stats. 49th Congress, 1st Sess., ch. 567, p. 86.

[4] Consult: Act of July 24, 1866, substantially re-enacted as Rev. Stat., §§ 5263–5268; as to penalties: Act of June 10, 1872, 17 Stat. 366; same: Rev. Stat., § 5269; as to what are post routes: Act of June 8, 1872, 17 Stat. 283 at p. 308, § 201; Rev. Stat., § 3964; Act of March 1, 1884, 23 Stat. 3; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1; Telegraph Co. *v.* Texas, 105 U. S. 460. Act to protect telegraph lines owned or occupied by the United States: June 23, 1874, 18 St. 250; Western Union Tel. Co. *v.* Pendleton, 122 U. S. 347; Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411; Leloup. *v.* Port of Mobile, 127 U. S. 640; Western Union Tel. Co. *v.* Alabama, 132 U. S. 472.

[5] United States *v.* Amer. Bell Telephone Co. (1886), 29 Fed. Rep. 17.

CHAPTER XIV.

PLACE OF HOLDING CORPORATE MEETINGS AND OF DOING CORPORATE ACTS.

§ **686. Scope of this Chapter.**— In this chapter it is intended to discuss the question of the *residence of corporations*, and the *place* of holding corporate meetings and of doing corporate acts, except so far as the question relates to *jurisdiction*, to *taxation*, and to the status of *foreign corporations*. These subjects are reserved for separate treatment.

687. Corporations Anciently Named as of Some Place.— It is said by Sir James Grant, in his work on corporations, that by the ancient law of England, every corporation must be created *as of some place*. This expression was used in the construction of ancient charters granted by the king, and meant nothing more than that, unless the charter named a certain place for the residence of the corporation, it was void.[1] But the ancient learning on this subject had reference to the *name* and *identity* of the corporation, and not to any power or disability to act in one place, and not in another. Thus, it is said in Bacon's Abridgment, " A corporation must be named of such a

[1] Grant Corp. 14, 53, 54; Case of Sutton's Hospital, 10 Coke Rep 29b.

place as will distinguish its situation from that of others."[1] The ancient rule that, unless a corporation is created and named as of some place, its charter is void, is said to be no longer the law in England.[2] "Generally," says this author, "we find that though formerly locality was held to be of the essence of the corporation,[3] in times when corporations were almost entirely municipal or intrusted with local government in some way, yet of late a different doctrine has prevailed, at least in practice; and it is not now necessary that a corporation unconnected with the administration of justice, and not holding land should be named of a place."[4]

§ 688. A Corporation Cannot have Two Domicils. — A corporation, it is often said, can have no legal existence outside of the bounds of the sovereignty by which it is created. It exists only in contemplation of law and by force of law; and where the law, by virtue of which it exists, ceases to operate, it can have no existence. It must dwell in the place of its creation.[5] As it can only exist, as a legal being, within the bounds of the sovereignty in which it has been created, it follows that it cannot have two domicils. And this principle has even been applied where a corporation has been created and endowed with the faculties which it possesses by the coöperating legislation of two or more States. In such a case, it is held, it cannot be one and the same legal being in both States. And this is so, although it is spoken of in the laws of the two States as one corporate body.[6]

[1] Bac. Abr. tit. Corp. C. 2; citing 10 Coke Rep, 29*b*; 32b; 2 Brownl. 244; And. 196; Rolle Abr. 513.

[2] Grant Corp. 14, 53, 54.

[3] Citing Button *v.* Wightman, Cro. Eliz. 338.

[4] Grant Corp. 53, 54. See Mayor & Burgesses of Stafford *v.* Bolton, 1 Bos. & Pul. 39; London Tobacco Pipe Maker's Company *v.* Woodroffe, 7 Barn. & Cress. 838. In this last case it was held that, where the charter of the corporation of a guild of tradesmen fixed the company's place of meeting at London or Westminster, or within three miles thereof, this was held to establish such local limits as were requisite upon such a charter. London Tobacco Pipe Makers' Co. *v.* Woodroffe 7 Barn. & Cress. 838, 852.

[5] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 588; Ohio &c. R. Co. *v.* Wheeler, 1 Black (U. S.), 286, 295; Rece *v.* Newport News &c. Co., 32 W. Va. 164; *s. c.* 9 S. E. Rep. 212.

[6] *Ante*, §§ 47, 48, 319, 320; Ohio &c. R. Co. *v.* Wheeler, 1 Black (U. S.), 286, 297. "It is true," said Taney, C. J., in giving the judgment of the court in this case, "that a

§ 689. **Resides where it Exercises its Functions.** — "The residence of a corporation," says the Supreme Court of Illinois, "if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised." Accordingly, it was held that a railroad corporation chartered by the State had a legal residence *in any county* in which it operated its roads.[1] There is, therefore, no difficulty in holding that, for the purposes of jurisdiction, procedure, litigation affecting a corporation,[2] and the taxation of its personal property,[3] it may be taken to reside where its chief office is.

§ 690. **Power to Establish Agencies at Other Places.** — A very strict and possibly a narrow construction of corporate charters has held that, in the absence of express authorization in such charters, they have no power to establish agencies for the transaction of their business at any other place than that fixed by their charters for their residences. Thus, a banking corporation chartered to do business at Pontiac, in Michigan, could not establish an agency in Detroit. The court said: "It would be

corporation by the name and style of the plaintiff's appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of or represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty, which brings it into life and endues it with its faculties and powers. The President and Directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, or maintain a suit in that character, against a citizen of Ohio or Indiana in a Circuit Court of the United States." Ohio and Mississippi Railroad Co. *v.* Wheeler, 1 Black (U. S.), 286, 297, 298. To the same effect see Farnum *v.* Blackstone Canal Co., 1 Sumn. (U. S.) 46; Rece *v.* Newport News &c. Co., 32 W. Va. 164.

[1] Bristol *v.* Chicago &c. R. Co., 15 Ill. 436; New Albany &c. R. Co. *v.* Haskell, 11 Ind. 301.

[2] Bristol *v.* Chicago &c. R. Co., 15 Ill. 436; Bank of North America *v.* Chicago &c. R. Co., 82 Ill. 493.

[3] Sangamon &c. R. Co. *v.* County of Morgan, 14 Ill. 163.

idle for the legislature to locate a bank, if the institution could perambulate the State, and establish agencies whenever and wherever it might think for its interest."[1] Somewhat analogous is an early decision in New York, where it was held that the trustees of an incorporated college, situated in the village of Geneva, in the western part of that State, had no power to establish a medical school in the city of New York, or at any other place than Geneva.[2] So where, by its charter, a college was located at Spring Arbor in Michigan, and a subscription was started for the purpose of erecting a college building therefor *at Hillsdale*, and it did not appear, by the subscription or otherwise, that it was designed as an inducement to the college to endeavor to obtain legislative authority to remove to Hillsdale, it was held that the subscription was void, as being made for a purpose not authorized by law;[3] — a good illustration of the doctrine that a corporation has not general perambulatory powers.

§ 691. **Whether they Lose their Corporate Character by Migrating.**— It follows from what has preceded, that a corporation may have a permissive existence in a State or county other than that which created it, by delegation or representation; it may have agents there, through whom it may make and take contracts, carry on its business and sue and be sued. But where a corporation *migrates* to another sovereignty, transfers to such State its *personnel* and the whole of its business, it has been held that it does not carry its corporate attributes with it, but that it becomes, in the State to which it has migrated, nothing more than a partnership, and its stockholders become liable as partners.[4] The Supreme Court of New York took this view of the question,[5]

[1] Atty.-General *v.* Oakland County Bank, 1 Walker Ch. (Mich.) 90, 97; People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282.

[2] People *v.* Trustees, 5 Wend. (N. Y.) 211.

[3] Underwood *v.* Waldron, 12 Mich. 73.

[4] Taft *v.* Ward, 106 Mass. 58. The same court has, however, held that the resident members of a corporation created in Massachusetts are liable upon contracts entered into by the corporation, in any State with citizens of that State, in like manner, and to the same extent as upon contracts entered into in Massachusetts with its citizens. Hutchins *v.* New England Coal Co., 4 Allen (Mass.), 580.

[5] Merrick *v.* Brainard, 38 Barb. (N. Y.) 574, 583. Mullin, J., in laying down this doctrine, used the following language: "If a corporation created in another State can transfer to

but its judgment was reversed by the Court of Appeals in a very able opinion by Porter, J.[1]

this State the whole of its business and transact the same here, under the principles of comity above alluded to, then, not only is our own legislature rendered useless and unnecessary, at least so far as the creation of corporations is concerned, but all the States in the Union, and all the legislatures in Christendom, can let loose upon us a multitude of these corporations, more destructive and pernicious than the frogs and lice let loose on the Egyptians."

[1] Merrick *v.* Van Santvoord, 34 N. Y. 208. The question substantially was whether a Connecticut corporation, by *migrating* to New York with its principal office and its business, performing no other acts in Connecticut than the holding of its annual meetings, had so far forfeited its corporate character that its members became liable in New York, as principals, for the torts of its servants. In giving judgment upon this question in the negative, Porter, J., said: "We think the recognition, in our State, of the rights hitherto conceded in our courts to foreign corporations is neither injurious to our interests, repugnant to our policy, nor opposed to the spirit of our legislation. Ours is peculiarly a commercial country. We have large inland lakes which serve as State and national boundaries. We have continental rivers which unite the States they seem to divide, and at their headwaters the tributaries of two oceans interlock. We have every variety of climate and production. Our agricultural and mineral resources are almost boundless. We have great facilities for internal intercourse, and favorable openings on every side in the various departments of human industry and enterprise. By common consent, all these advantages have been regarded as open to every American citizen, though many of the inland States are untouched by the great natural highways of commerce. In no other country has so much been achieved by the association of capital and labor, through corporate organization. It has enabled the many whose means were limited, to contribute to the accomplishment and participate in the benefit of great undertakings, which were beyond the compass of individual resources and enterprise. It has taken, without let or hindrance, the direction to which it was invited by the general law of supply and demand. The same enlightened policy has prevailed in every portion of the country. All have welcomed labor from abroad, and invited the free investment of capital. Hitherto, corporate enterprise has not been trammeled by unfriendly legislation. No jealousy of competition or rivalry of adverse interest has been permitted to convert State lines into barriers of obstruction to the free course of general commerce. Its avenues have been open to all. In this country our material interests are so interwoven that the union of the States is due, in its continuance, if not in its origin, as much to commercial as to political necessity. The citizens of each claim a birthright in the advantages and resources of all. They demand from their local authorities such facilities as the law-making powers can afford in the employment of labor and capital. They claim such corporate franchises and immunities as may enable them to compete on equal terms with the citizens of other States. For these, from the structure of our institutions, they naturally look to their own government. They acknowledge a double allegiance in their local and Federal

§ 692. Distinction between Citizenship and Residence of a Corporation. — A distinction is sometimes taken between the

relations, which, by general consent, carries with it a correlative community of rights. They may live in an inland State, but they are none the less citizens of a maritime nation; and they may lawfully organize companies at home for traffic on ocean highways. A corporate charter is in the nature of a commission from the State to its citizens, and their successors in interest, whether at home or abroad. Each government, in the exercise of its own discretion, determines the conditions of its grant. It is free to impose or remit territorial restrictions. It cannot enlarge its own jurisdiction, but it can confer general powers, to be exercised within its bounds, or beyond them, wherever the comity of nations is respected. For the purposes of commerce, such a commission is regarded, like a government flag, as a symbol of allegiance and authority; and it is entitled to recognition abroad until it forfeits its recognition at home. Under such commissions, New York has sent forth its citizens, from time to time, with corporate franchises and immunities, to gather wealth from the coal mines of Pennsylvania, the silver mines of Mexico, and the gold mines of California; to establish lines of inland navigation on the Orinoco and the Amazon; to plant forest trees beyond the Mississippi; to fish in the Northern and Southern Oceans; to found Christian missions in Asia, and to colonize freedmen on the coast of Africa. In many of these cases the franchises were, by the terms of the charter, to be exercised in foreign territory. In 1826, for instance, Churchill C. Cambreling and others were, by a law of New York, constituted a body corporate, under the title of 'The United States Mexican Company,' organized 'for the purpose of purchasing, leasing, and working gold and silver mines in Mexico and South America.' Laws 1826, p. 143. In the act of 1827, incorporating 'The New York South American Steamboat Association,' it was provided that the annual elections should be held in the city of New York, but there was no requirement that any of the officers should be residents; and the company was authorized, in terms, to navigate its vessels 'upon any water or waters *not within the jurisdiction of New York.*' Laws 1827, p. 308. The Panama Railroad Company was organized, under a charter from this State, to construct and maintain a railway 'across the Isthmus of Panama, in the republic of New Granada.' The only act which the charter requires to be done in this State is the annual election of its officers; and, on the theory maintained by the respondents, every shareholder in that company, wherever found, is individually liable for all the wrongs it commits and all the debts it contracts. Laws of 1849, p. 407. Other illustrations of our legislative construction of the rules of national comity will be found in the acts incorporating the 'North Carolina Gold Mining Company,' the 'Orinoco Steam Navigation Company,' the 'Pacific Mail Steamship Company,' the 'California Inland Steamship Navigation Company,' the 'African Civilization Company,' and the 'American Forest-Tree Propagation and Land Company.' Laws 1828, p. 211; Laws 1847, p. 513; Laws 1848, p. 396; Laws 1850, p. 627; Laws 1864, p. 758; Laws 1865, p. 360." Compare Smith *v.* Alvord, 53 Barb. (N. Y.), 415.

citizenship and the *residence* of a corporation. Thus, it is said that a corporation may have a *residence* at any place where it exercises its functions;[1] but it can only be a *citizen* — so far as it can be said to be a citizen, of the State by which it was created. "While the citizenship of a corporation would depend upon the place of the law of its creation, its residence might manifestly, upon the principle above stated, be in any State where it was, by comity, permitted to exercise its franchises.[2]

§ 693. Enjoining a Corporation from Removing its Assets out of the State. — Recurring to the doctrine that the assets of a corporation are a *trust fund* primarily for its creditors and secondarily for its stockholders,[3] it seems not an unreasonable conclusion that, where the circumstances warrant such interposition, its managing agents may be enjoined in equity from removing its assets into a foreign jurisdiction. Where such an injunction was granted, the court started with a presumption against the right of the corporators to exercise their corporate powers and franchises outside the State by which the corporation had been created, and proceeded on the principle that the burden rested on them to show that, by the laws of the State into which they proposed migrating, they were permitted to maintain their corporate existence and to perform their corporate functions within that sovereignty. Said Allison, P. J.: "Conceding, therefore, that the use intended to be made by the defendants of the property of the corporation is, in every respect, just, as well as strictly legal, they stand convicted, by their own confession, of an intention to remove it from the jurisdiction which had undoubted control over it, and the corporation which is represented by its trustees in this proceeding, and when once beyond our reach, our power over it may be lost forever."[4] This is analogous to the principles on which courts of equity proceed in the control of *trustees*. Thus, if a trustee becomes so situated that he cannot effectually execute the office, as by becoming a permanent resident abroad, a court having

[1] Bank of North America *v.* Chicago &c. R. Co., 82 Ill. 493; Bristol *v.* Chicago &c. R. Co., 15 Ill. 436.

[2] Bank of North America *v.* Chicago &c. R. Co., *supra.*

[3] *Post*, § 2951.

[4] Matthews *v.* Trustees, 7 Phila. (Pa.) 270.

jurisdiction over the trust will remove him and appoint a new trustee in his stead.[1] It has been held that where a trustee in a railway mortgage voluntarily removes to a foreign country and becomes a resident thereof, this vacates his office and disables him from performing its functions; so that if, after such removal, he attempts to prosecute a suit in a Federal court, the State court having jurisdiction of the trust will enjoin him.[2] On the other hand, where the *cestui que trust* was prohibited by law from coming into the State, the court having control of the trust, on the trustee's own petition, discharged him, and appointed one living in the same State as the *cestui que trust*.[3] In short, if the trustee absconds or otherwise places himself beyond the reach of the court having control of the administration, this will be ground for appointing a new trustee.[4] In like manner, if the trustee is a corporation and has become subject to a foreign power, this will be a good ground of removing it and substituting another trustee.[5] Accordingly, where the College of William and Mary in Virginia, originally chartered by the crown, had become, in consequence of the revolution, subject to the jurisdiction of a foreign power, to wit, the State of Virginia, it was held by the Court of Chancery in England that a new scheme must be laid before the court for the administration of a charity which had been committed to that corporation.[6] Regarding the assets of a corporation as a trust fund, and its directors and officers, and the legal entity called the corporation as well, as trustees, for the beneficiaries in the trust, the foregoing decisions indicate the grounds upon which the migration of a corporation and the carrying of its assets into another jurisdiction may be restrained. It ought to be said that such injunctions are *unusual*,

[1] 1 Perry Trusts (3d ed.), § 275; O'Reilly *v.* Alderson, 8 Hare, 100; Re Ledwick, 8 Irish Eq. 561; Com. &c. *v.* Archbold, 17 Irish Eq. 187; Lill *v.* Neafie, 31 Ill. 101; Re Rignold Settlement, L. R. 7 (Ch.) 223; Maxwell *v.* Finnie, 6 Coldw. (Tenn.) 434; Mennard *v.* Welford, 1 Smale & G. 426; Re Stewart, 8 Week. Rep. 297; Re Harrison's Trusts, 22 L. J. (Ch.) 69; Dorsey *v.* Thompson, 37 Md. 25; Ketchum *v.* Mobile &c. R. Co., 2 Woods (U. S.), 532.

[2] Farmers' Loan & Trust Co. *v.* Hughes, 11 Hun (N. Y.), 130.

[3] Ex parte Tunno, 1 Bailey Eq. (S. C.) 395.

[4] Millard *v.* Eyre, 2 Ves. Jr. 94; Gale's Pet., R. M. Charlt. (Ga.) 109; Re Mais, 16 Jur., Part 1, 608.

[5] Atty.-General *v.* London, 3 Brown (Ch.), 171.

[6] *Ibid.*

and that the case above cited,[1] is the only instance of the kind which has come to the writer's notice.

§ 694. Constituent Acts must be Performed within State of Creation.— It is undoubtedly true that, for the purposes of performing *constituent acts*, that is, those acts which are necessary to the organization and existence of the corporation itself, or to its final dissolution, it only exists within the territory of the jurisdiction which has created it; and this, we apprehend, is all that remains of the meaning of the proposition, frequently announced in general terms in the judicial decisions, that a corporation exists only within the territory of the jurisdiction which has created it.[2] As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty which confers it, they cannot, it has been held, possess and exercise it there, and any attempt to exercise such a faculty there, is merely a usurpation of authority by persons destitute of it, and acting without any legal capacity to act in the manner attempted. It was accordingly held that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void.[3] The Maine court lay down the further rule, that corporations duly existing within the State may act and contract beyond its limits, by an *agent* or *agents* duly constituted, but can neither exist nor contract, *per se*, without those limits, except by the assistance of its officers or agents duly elected or appointed within them.[4] In other words, while a corporation cannot exercise its *primary franchises* outside the sovereignty by which it is created, yet it may exercise its *secondary franchises* within the territory of another sovereign, if not for-

[1] Matthews *v.* Trustees, 7 Phila. (Pa.) 270.

[2] Galveston R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 476; Hilles *v.* Parrish, 14 N. J. Eq. 380, 383; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 588; Runyan *v.* Lessee of Factory, 13 Pet. (U. S.) 122, 129. See, however, Ohio &c. R. Co. *v.* McPherson, 35 Mo. 13, 26; Arms *v.* Conant, 36 Vt. 750.

[3] Miller *v.* Ewer, 27 Me. 509, 519; *s. c.* 46 Am. Dec. 619. The same doctrine prevails with reference to the powers of executors, administrators, guardians, assignees under bankrupt and insolvent laws, and the like. Story Conflict Laws, §§ 405-417, 512; Williams *v.* Storrs, 6 Johns. Ch. (N. Y.) 353, 357.

[4] Miller *v.* Ewer, *supra.*

bidden to do so by its own charter or by the law of that sovereign. Thus, a banking corporation may, if not forbidden by its charter, make contracts in another State by the comity of such State, which will be valid and enforcible.[1] In accordance with this view, it has been held by the Supreme Court of Connecticut, that it is competent for the *directors* of a manufacturing corporation chartered by the State of Connecticut, to meet in the State of New York and there *appoint a secretary;* and the secretary so appointed was held to have been legally appointed.[2]

§ 695. Corporation when Estopped from Raising the Question. — In a later authoritative case, a new element has been introduced into this subject, the element of estoppel. The board of directors of a corporation created by the State of Texas, held a meeting in the city of New York, at which a *mortgage* of the property and franchises of the company was ordered to be executed. In all other respects the mortgage was executed and recorded with the prescribed formalities; so that the question came down to this: Can a corporation repudiate a mortgage given to secure its bonds, held by *bona fide* holders, on the ground that its directors authorized its execution by a resolution passed outside the State, the mortgage being in other respects executed and recorded in due form of law. Can it take all the benefit of such a transaction, unload the bonds on the business community, and then repudiate its mortgage for such a cause? It was held that it could not. In giving the judgment of the court, Mr. Justice Bradley used the following language: "No doubt it may be true, in many cases, that the extra-territorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports, 383,[3] where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute; and it is generally true that a corporation exists only within the territory of

[1] Lane *v.* Bank, 9 Heisk. (Tenn.) 419.

[2] McCall *v.* Byram Man. Co., 6 Conn. 428.

[3] Referring to Hilles *v.* Parrish, 14 N. J. Eq. 380.

the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact business in another territory, and may sue and be sued therein. It may hold land in another territory, so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when that action is the basis of negotiations by which third parties have *bona fide* parted with their money and the company has received the benefits of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities. Must a person, purchasing railroad bonds in Wall street or Walnut street, first send to Illinois, California, or Texas, to see whether the meeting of the directors which authorized the mortgage given to secure the bonds was held in a proper place? Whoever may, under supposable circumstances, raise an objection of this kind, it ought not to lie in the mouth of the company to raise it. And, if the company are estopped, then those who purchase the property of the company at an execution sale must be estopped. It has frequently been held that such a purchaser takes only the right, title, and interest which the debtor had, subject to the equities which existed against the property in his hands when the judgment was recovered." [1]

§ 696. Validity of Corporate Elections held Outside the State. — It has been laid down by the Supreme Judicial Court of Maine that the votes and proceedings of persons professing to act in the capacity of corporators and as a corporation, when assembled without the bounds of the sovereignty granting the charter, are *wholly void*.[2] It is held by the same court that a general clause in the charter of a corporation authorizing certain persons to call the first meeting of the corporation at such time and place as they think proper, does not authorize them to call the meeting at a place without the limits of the State, and that the officers elected at such a meeting are not even officers *de*

[1] Galveston Railroad *v.* Cowdrey, 11 Wall. (U. S.) 459, 476.

[2] Miller *v.* Ewer, 27 Me. 509; *s. c.* 46 Am. Dec. 619; Freeman *v.* Machias &c. Co., 38 Me. 345. But see Copp *v.* Lamb, 12 Me. 312, 314.

facto.[1] In New Jersey, where there was a statute which provided that all corporations whose charters did not designate the places of their meeting should hold their business meetings and the meetings of their directors within the State, it was held that a resolution of the board of directors of a corporation at a meeting held in the city of Philadelphia, in Pennsylvania, whereby certain transfers of stock were authorized, was void.[2] The same rule prevails in Texas; and where the articles of association of a corporation, created under the laws of Texas, authorized the corporation to transact its business at Paris, in France, it was held that the corporation could not hold stockholders' meetings outside of Texas, and that directors elected at a meeting held at Paris were not even directors *de facto*, and that their acts were a *nullity.*[3] On the contrary, the view taken in Colorado is that the fact that the annual meeting of the stockholders of a corporation created under the laws of that State, for the election of directors, is held outside the State, cannot be raised in a collateral proceeding, either by the corporation or by one who has contracted with it as such, although such a meeting is irregular and illegal;[4] and this is in accordance with a principle elsewhere explained.[5] A corporation created by the concurrent legislation of two States,[6] receiving from each the same charter in legal effect, has a legal domicile in each State, and may lawfully hold its meetings and transact its corporate business *in either State.*[7] In some of the new States and territories, whose policy it is to encourage the introduction of foreign capital, provisions have been made by statute, allowing corporate meetings to be held beyond the limits of the State or territory. Thus, the provisions of the civil code of Dakota territory, relating to the place of meeting of directors and stockholders of corporations,[8] has been amended so as to permit such meetings to be held at any place within or without the territory, where the corporation appoints an agent within the territory upon whom service of

[1] Miller *v.* Ewer, 27 Maine, 509; *s. c.* 46 Am. Dec. 619.

[2] Hilles *v.* Parrish, 14 N. J. Eq. 380.

[3] Franco-Texan Land Co. *v.* Laigle, 59 Tex. 339.

[4] Humphreys *v.* Mooney, 5 Col. 282.

[5] *Ante*, § 518, *et seq.*

[6] *Ante*, §§ 47, 48, 319, *et seq.*

[7] Covington &c. Bridge Co. *v.* Mayer, 31 Ohio St. 317.

[8] Civ. Code Dak. Ter., § 412, subsec. 3.

process may be made.[1] And the statute of Colorado[2] allows meetings of directors to be held beyond the limits of the State, if provision is made therefor in the certificate of incorporation.[3] The statute of Minnesota[4] permits meetings to be held at any place within or without the State.

§ 697. **Meetings Held at what Place within the State.**—Where the by-laws of a corporation authorize the president to call special *meetings* of the *directors*, upon giving notice of the time and place thereof, and such place is not prescribed by the by-laws, the president may call such meeting at a place other than the principal place of business of the corporation.[5] Where the charter does not prescribe the place where the annual elections are to be held, the board of managers have the right to fix the place, and the officers elected at the place so fixed will be at least officers *de facto*, with power to hold their offices unless ousted by *quo warranto* brought during the official terms of such officers.[6]

[1] Act March 11, 1887, L. 1887, c. 36, p. 85.

[2] Gen. Stat. Colo., chap. 19, § 18.

[3] See Humphreys *v.* Mooney, 5 Col. 282.

[4] Rev. Stat. Minn. (1881), p. 449, § 404.

[5] Corbett *v.* Woodward, 5 Sawyer, (U. S.), 403.

[6] Commonwealth *v.* Smith, 45 Pa. St. 59. *Mandamus* refused to compel a corporation to keep its *records* at the place where its business of manufacturing was done; the evidence showing that the books had been correctly kept, and that the petitioner had been furnished with all the information from such books which he required: Pratt *v.* Meriden Cutlery Co., 35 Conn. 36.

CHAPTER XV.

CORPORATE ELECTIONS.

ARTICLE I. ASSEMBLING THE MEETING.

§ 700. Mandamus to Compel the Holding of a Corporate Election. — A *mandamus* has been frequently granted by the English Court of King's Bench, in the case of *municipal corporations,* to compel the corporate authorities to hold a corporate

election.[1] The English courts, it is well known, restrain the writ of *mandamus* to the enforcement of rights of a *public nature*, though in America the remedy has been much enlarged, and now extends in many cases to compel the doing of acts of a *private nature*, where the relator has no other remedy. The use of the writ to redress injuries in private corporations is vindicated by a decision of the Supreme Judicial Court of Massachusetts, where it was held, on a learned review of the decisions, that the circumstance that a corporation is in the nature of a partnership, as where it is merely a *manufacturing company*, does not preclude the use of the writ of *mandamus* in a proper case. This holding is a distinct authority for the proposition, denied in some of the English cases, that the use of *mandamus* in such cases is not restricted to instances where *public* rights are involved.[2] On the other hand, the directors of a corporation, who are in office, cannot dispute the right of a stockholder, holding a majority of the stock, to have an election in accordance with the by-laws, on the ground that he intends to use his legal rights for purposes detrimental to the interests of the corporation, and that the desired election is merely a step toward that end.[3] If

[1] In one case a *mandamus* was granted to the mayor, bailiffs and burgesses of the corporation of Cambridge, to compel the holding of a corporate election. After the election had taken place, it was shown to be merely colorable and illusory, and had for the mere purpose of enabling the mayor to hold over. The election in question resulted in choosing as mayor an officer in the army, just gone to North America and without the least probability of returning till long after the year, which was the term of the office, would be expired. Rex *v.* Mayor of Cambridge, 4 Burr. 2008. In another case a *mandamus* was granted under a statute, 11 Geo. I., c. 4, to compel the election of a mayor, although there was a mayor *de facto*. The objection that a *de facto* officer (who appeared to be holding without a shadow of right), ought to be first ousted was held not good, because the intent of the statute was to give the corporation a rightful officer as soon as might be; whereas this pretense would waste the whole year. This decision, however, was made to rest upon its own peculiar circumstances,— the court saying that it "might be otherwise where there was a probable election and room to doubt; and that these writs were discretionary. Besides there was no harm done; for it is not a peremptory *mandamus*, and they may return 'that there is a rightful officer.'" Case of the Borough of Boffiny, 2 Strange, 1003.

[2] American Railway-Frog Co. *v.* Haven, 101 Mass. 398; *s. c.* 3 Am. Rep. 377.

[3] Camden &c. R. Co. *v.* Elkins, 37 N. J. Eq. 273.

the election is to fill a *vacancy*, the officer elect holds for unexpired term of the officer, whose death, resignation or removal created the vacancy, in the absence of a contrary provision in the governing statute or by-laws.[1] The board of directors cannot enlarge the tenure of a ministerial officer of the corporation, beyond that expressed in the governing statute. When, therefore, the charter of an association required a chief engineer to be elected "annually" by the board of delegates, also elected annually, and a board elected one for a term of five years, it was held, that his tenure ended the election of another by the succeeding board; and this although such election did not take place on the day prescribed in the charter therefor, but at a later regular meeting.[2]

§ **701. Time of Holding Corporate Elections.** — Several decisions are met with, on the question of the *time* at which corporate elections are to be held, but they mostly turn upon the language of particular charters or statutes, and do not follow the thread of any definite principle. On obvious grounds, it has been held that where the charter provides for an annual election of a board of managers, those in power cannot lengthen their term of office by *changing the date* of the annual election from May to November, and thus extend their official terms.[3] The provision of a special charter requiring directors to be chosen at the *annual meetings* of the corporation, has been held directory and not restrictive, so that its observance was not deemed necessary to the validity of an election.[4] It has been held that a statute requiring the directors and treasurer of a corporation to be chosen annually by the stockholders, at such time and place as shall be provided by the by-laws of the company, is inapplicable to the first choice of officers by persons associating themselves together, and proceeding to create and constitute themselves a body politic. The court reason that no by-laws can be adopted by or for a corporation before the corporation itself is created. When the associates first meet together, in pursuance of their articles of association, and then commence the in-

[1] People *v.* McKinney, 41 Barb. (N. Y.) 516.

[2] State *v.* Batt, 38 La. An. 955.

[3] Mattu *v.* Primrose, 23 Md. 482.

[4] Hughes *v.* Parker, 20 N. H. 58.

itiatory steps towards constituting themselves a body politic and corporate, they may and must determine the *manner* in which all needful officers shall be elected. Having been duly organized, the association becomes a corporation, with all the powers and privileges, and subject to all the duties, restrictions, and liabilities, incident to that relation.[1] Where a bank charter provided that directors may be chosen "at any time," and a subseqent act provides that, if they shall not be chosen on a day designated, the president and directors shall notify an election to be held within thirty days thereafter, the latter is not a repeal of the former, and does not prevent an election being had after the thirty days.[2] It has been held no ground for postponing the election, that the treasurer of the commissioners appointed by the statute for the organization of the corporation, according to a course in vogue during the period of special charters,[3] withholds the funds which have been received from the control of the commissioners, although they have a right to them.[4] It has been held that the inspectors of an election for directors have a discretion to *keep open the polls* beyond the hour limited by the board from which they derive their authority.[5] The New York statute relative to the observance of Sunday does not apply to the proceedings of business meetings of societies held on that day. The holding of business meetings of a benevolent society, transacting its business, *on Sunday*, is not forbidden as illegal.[6]

§ 702. Statutory Provisions as to Time of Meeting. — Most of the statutes provide that directors shall be elected *annually*.[7] Others contain the same provision, with the qualification that the time and place of the meeting shall be fixed by *by-laws*.[8] Others establish the date, provided the by-laws do not fix it.[9] One statute relating to special

[1] Boston &c. Manuf. Co. *v.* Moring, 15 Gray (Mass.), 211.

[2] M'Neely *v.* Woodruff, 13 N. J. L. 352.

[3] *Ante*, § 44.

[4] Hardenburgh *v.* Farmers &c. Bank, 3 N. J. Eq. 68.

[5] Matter of Mohawk &c. R. Co., 19 Wend. (N. Y.) 135.

[6] People *v.* Young Men's &c. Soc., 65 Barb. (N. Y.) 357.

[7] Gen. Stat. Colo. 1883, chap. 19, § 86; Deer. Cal. Code, part 4, § 302; 2 Sayle Tex. Stat., art. 4125 (railroad companies).

[8] Gen. Stat. Colo. 1883, chap. 19, § 86; Comp. Stat. Neb. 1887, chap. 16, 80.

[9] As in California, the first Tuesday in June. Deer. Cal. Code, part 4, § 302.

meetings for the election of directors where the regular annual meeting has not been held, provides that if the day falls on Sunday or a legal holiday, the election shall be held on the next secular day.[1] By the statute of Nebraska, the annual meetings of the stockholders shall be held on the first Monday of January in each year, at which meeting directors shall be elected, and such other lawful business transacted as they shall deem necessary.[2] In some States the whole subject is remitted to the *by-laws*, — as in Oregon, where, after providing for the first meeting, the statute provides that by-laws shall prescribe the time and manner of holding the future meetings.[3] So, in California, directors of a railroad corporation may be elected at a meeting of stockholders, other than the annual meeting, as a majority of the fixed capital stock may determine, or as the by-laws may provide. Notice to be given as provided for notices of meetings, by another part of the statute, to adopt by-laws.[4]

§ 703. Statutory Provisions as to Place of Holding Corporate Elections.— On principles stated in a former chapter,[5] it may be stated, as a general rule, that corporate elections can only be held *within the State* under whose laws the corporation is organized, unless there be a statute of the State permitting it to be held elsewhere. Several statutory directions are met with as to the place of holding such elections. Such place is generally fixed at the principal place of business of the corporation,[6] or at its principal office.[7] In other States, both the time and place of holding such elections are to be established by the corporation by by-laws.[8] As already seen[9] constitutional provisions exist in some of the new States, authorizing the holding of corporate meetings outside the State. By statute in Minnesota both stockholders' and directors' meetings may be held outside the State.[10] In Indiana the election of directors is to be held at the place provided for in the charter unless there has been a change in the place of business of the corporation, in which case it is to be held at the place to which such change shall have been made.[11] By the statute of Kentucky elections for directors and officers must be held within the State.[12] The same statute provides that

[1] Rev. Stat. Wis. 1878, § 1762.

[2] Comp. Stat. Neb. 1887, chap. 16, § 38.

[3] Hill Laws Ore., § 2236.

[4] Deer. Code Cal., part 4, § 464.

[5] *Ante*, § 696.

[6] 2 Rev. Stat. Ind. 1888, § 3021.

[7] Deer. Cal. Code, part 4, § 319.

[8] 1 Gen. Stat. Kan., § 1174; Sayle Tex. Civ. Stat. 1888, art. 579; Ark. Dig. Stat. 1884, § 964.

[9] *Ante*, § 696.

[10] Rev. Stat. Minn. 1881, p. 449, § 404.

[11] Rev. Stat. Ind. 1888, § 3021.

[12] Gen. Stat. Ky. 1887, chap. 767, § 1.

meetings held out of the State shall be void, with the exception of meetings of the Cincinnati Southern Railroad.[1]

§ 704. Who may Call the Meeting. — It is, in general, essential to the validity of acts done at a special or called meeting of a corporation, that the call shall be made by the person or persons appointed by the governing statute to call such meetings;[2] though, under some conditions, acts done at a meeting called by unauthorized persons may be regarded as valid until called in question by the State.[3] According to one view, the call for an original meeting of corporators to elect directors need not be made by a *formal order* of those authorized to make the call; but it is sufficient if it be made by their *direction*.[4] A stricter view has resulted in the conclusion, under a statute,[5] that where the meeting is to be called by the board of directors, or by any number of stockholders holding, together, at least one-tenth of the capital stock, — a call made by the secretary, on the *authority* of stockholders holding one-tenth of the capital, is invalid and all proceedings thereunder illegal.[6] A similar strictness has prevailed in New Hampshire, in respect of a call made under a

[1] *Ibid.*

[2] Reilly *v.* Oglebay, 25 W. Va. 36; Bethany *v.* Sperry, 10 Conn. 200. In New Hampshire, where a corporation has no officer by whom a new meeting can be called, its powers are *suspended* or *dormant*, till it is reorganized under a new charter, or by a meeting called under the statutes, by a justice of the peace. Goulding *v.* Clark, 34 N. H. 148.

[3] Where *one* of three persons named as corporators in an act of the legislature, incorporating them and their "associates," called a meeting of the "subscribers to the capital stock," to meet "for the purpose of organizing and electing the necessary officers," and the *two* other corporators did not consent to the call, but upon being requested refused to join therein, and the organization of the meeting was otherwise legal, — it was held to be a *valid corporation* against all persons but the commonwealth and the two persons named as corporators who refused to join, although there were no subscribers to the capital stock before the act of incorporation. Walworth *v.* Brackett, 98 Mass. 98. After the requisite amount of stock has been subscribed to authorize the stockholders to elect directors, it is not indispensable to an election that the notice for it should be given by the persons named in the certificate of incorporation. The validity of the acts of the directors cannot be questioned collaterally, on the ground of irregularity in giving the notice. Chamberlain *v.* Painsville &c. R. Co., 15 Oh. St. 225.

[4] Hardenburgh *v.* Farmers &c. Bank, 3 N. J. Eq. 68.

[5] W. Va. Code, chap. 53, § 41.

[6] Reilly *v.* Oglebay, 25 W. Va. 36.

statute by a *justice of the peace.* The court hold that the statutory power must be strictly complied with, and accordingly that the justice cannot make the call unless on such a petition of proprietors as is prescribed by the statute; and, proceeding by analogy to the view that in such cases the jurisdiction must affirmatively appear, it is also held that the petition to the justice must be shown to be signed by requisite number of proprietors.[1] But, as the act devolved upon the justice is merely ministerial, the fact that he is a *stockholder* does not disable him from issuing the warning for the meeting, or even presiding thereat.[2] A similar strictness prevails under New England statutes relating to the calling and warning of *town meetings.* Authority to the clerk to call and warn the *annual meetings* has been held not to authorize him to call and warn *special meetings*, and hence the acts and doings at a special meeting thus called are *void.*[3] Nor does authority to "*warn*" future meetings authorize the clerk to "*call*" such meetings.[4] While these conclusions arise under statutes, it is not perceived why they are not equally applicable in the case where the persons who shall make the call are designated by a valid by-law. Nevertheless, it has been held that a *by-law* of an insurance company, which provides that a special meeting shall be called by the president, or, in his absence, by the secretary, on application made to them in writing, by ten members, does not preclude the directors from calling special meetings without such application.[5]

§ **705. Statutory Provisions as to Who may Call.** — By statute in Missouri, every meeting of the shareholders of a corporation must be convened by its president and secretary.[6] If the president and secretary fail to call any meeting required by law or by the by-laws of the corporation, any two shareholders may call such meeting, and appoint inspectors, even though on a later day than prescribed by statute or by-law.[7] By a statute of New York, if the directors named in the act of association neglect or refuse to adopt a by-law fixing and regulating

[1] Goulding *v.* Clark, 34 N. H. 148.

[2] Ashuelot R. Co. *v.* Eliot, 57 N. H. 397.

[3] School District *v.* Atherton, 12 Metc. (Mass.) 105.

[4] Stone *v.* School District, 8 Cush. (Mass.) 592.

[5] Citizens Ins. Co. *v.* Sortwell, 8 Allen (Mass.), 217.

[6] Rev. Stat. Mo. 1889, § 2484.

[7] *Ibid.*

annual elections, by reason of which neglect the directors hold over, the stockholder may elect directors sixty days after the expiration of the first year, after giving fifteen days' written notice to all stockholders of a meeting for that purpose at the principal office of the company (or, if the use of such office be denied, at some designated place in the town or city where the principal office is located).[1] In some of the States whose statutes are modeled after the theories which were in vogue under special charters,[2] provision is made that the *commissioners* charged with the promotion of the corporation shall convene a meeting of subscribers for the purpose of electing directors or managers and of transacting other business.[3] In the statutes of Arkansas there is a provision relating to railroads similar to that found in the statutes of Illinois, to the effect that, after the capital stock is subscribed the commissioners appointed to receive the subscriptions shall appoint a time and place for a meeting of stockholders to choose not less than five nor more than thirteen directors.[4] In the same State *stockholders* owning two-thirds of the stock on which all assessments are paid, may call a meeting of the corporation, by signing a call therefor with their proper names, stating the number of shares held by each, and filing the same with the president or secretary of the corporation, and publishing the same in some newspaper in the county of the principal office of the corporation, for three successive weeks prior to holding the meeting, and by mailing a copy to each director at his usual place of abode.[5] In Indiana the first meeting of all corporations shall, unless otherwise provided for, be called by a notice signed by three or more members, setting forth the time, place, and purpose of the meeting, which notice shall, at least ten days before the meeting, be delivered to each member, or be published in some newspaper in the county where the corporation may be established; or, if there be no such newspaper, then in some newspaper in the State nearest thereto.[6] By statute in Ohio, unless the regulations of the corporation otherwise provide, an annual election for trustees or directors shall be held on the first Monday of January of each year. If trustees or directors are, for any cause, not elected at the annual meeting, or other meeting called for that purpose, they may be chosen at a members' or stockholders' meeting, at which all the members or stockholders are present in person or by proxy; or at a meeting called by the trustees or directors, or any two members or stockholders, notice of which has been given in writing, to each stockholder,

[1] 3 Rev. Stat. N. Y. 1889 (Banks & Bros. ed.), §§ 1, 3, 4.

[2] As to which see *ante*, § 44.

[3] Starr & Curt. Ill. Stat., p. 610, § 3.

[4] Ark. Dig. Stat. 1884, § 5425.

[5] Starr & Curt. Ill. Stat., p. 617, § 22.

[6] Rev. Stat. Ind. 1888, § 3004.

or by publication in some newspaper printed in the county where the corporation is situated, or has its principal office, for ten days, and trustees and directors shall continue in office until their successors are elected and qualified.[1] In Michigan, the first meeting shall be called by a twenty days' notice, signed by one or more members or persons associating, setting forth the time, place and purpose of the meeting. It shall be delivered to members, or published in newspapers of the county, or of a county adjacent to the county in which the corporation is to be organized, or in Detroit. This notice may be dispensed with in the articles of incorporation or in an enabling act.[2] Meetings for the annual election of directors are, in that State, provided for by the by-laws established by the directors, and the directors call the meeting. If they neglect to call it, it may be called by any number of stockholders representing one-fourth of the stock.[3] In California, an adjourned election may be held on a day fixed by law or by the directors. If no such day is fixed, the holders of one-half of the votes may call such an election in writing. Notice must be given by the secretary, if there be one, but if there is none, or he refuses to act, it may be served directly on the members, as provided by section 301 of the Code of that State.[4] In Nebraska, *promoters* of railroad companies, upon securing a subscription of one-tenth of the capital stock, may call a meeting of stockholders to choose seven directors to hold office until the annual election.[5] In Wisconsin, the *directors*, unless it is otherwise directed by law, or by the by-laws of the corporation, shall order annual elections of officers of the company. If they fail to do so, the corporation is not thereby dissolved, but a special meeting may be called, by giving the same notice as for the annual meetings. If the directors fail to call such special election within ten days after the time for the annual election, it may be called by two or more stockholders, at such time and place as they may appoint, by giving ten days' personal notice in writing to each stockholder, or by two weeks' publication in a newspaper nearest the location of such corporation.[6] In Kentucky, if the officer whose duty it is to call an election fails or refuses to do so, he may be compelled by an order of court to call the same, if he reside in the State. The court may so order, upon the application of any number of stockholders owning not less than ten shares in the corporation.[7] In Arkansas, two subscribers may call the first meeting, to be held at such time and place as they may appoint, by giving notice in one or

[1] Giauque Oh. Stat., § 3246.

[2] How. Mich. Stat., § 4862.

[3] *Ibid*, § 3317.

[4] Deer. Code Cal., part 2, § 314.

[5] Comp. Stat. Neb. 1887, chap. 16, § 80.

[6] Rev. Stat. Wis. 1878, § 1762.

[7] Gen. Stat. Ky. 1887, chap. 769.

more newspapers in the county in which the corporation is to be established, or in an adjoining county, fifteen days prior to the meeting.[1] In the same State general meetings of stockholders of railroad companies must be held annually at the time and place appointed for the election of directors. Special meetings may be called by the directors, or by any number of stockholders owning one-third of the stock, by giving thirty days' notice of the time and place in a newspaper in each county through which the road runs, if it has a newspaper.[2] In Oregon, corporators, or any of them, after the stock is subscribed, may call a meeting of stockholders to elect directors, stating the time and place of such meeting, and it is lawful for the subscribers to elect a board of directors as soon as one-half of the capital stock is subscribed.[3]

§ **706. Necessity of having Meeting duly Assembled.** — The members of a corporation, public or private, can do no corporate act of a constituent character, such as must be done at a general meeting of all the members or of a quorum of them, unless the meeting is *duly assembled*, in conformity with the law of its organization.[4] The same rule applies in respect of corporate business which is required to be done by the *directors*, and which cannot be remitted to the mere ministerial *agents* of the corporation; so that the assent of a *majority of the directors*, at a meeting of the board which has not been regularly called, as where *notice* of the meeting has not been given, will not be sufficient to give validity to an act as the act of the board.[5] It has been well said that the act of a *majority* of the corporators does not bind the *minority*, if it has not been expressed in the form pointed out by law; and accordingly, that the act of a majority, expressed elsewhere than at a meeting of the stockholders, is not binding on the corporation, — as where the assent of each one is given separately and at different times.[6] The reason is that each member has the

[1] Ark. Dig. Stat. 1884, § 963.

[2] Ark. Dig. Stat. 1884, § 5429.

[3] Hill An. Stat. Ore., § 3222.

[4] Courts of justice cannot regard the wishes of the majority of the members of a corporation, unless expressed in a valid form, in conformity with the by-laws and charter. German Ev. Cong. *v.* Pressler, 14 La. An. 799.

[5] Dispatch Line *v.* Bellamy Man. Co., 12 N. H. 205, 224; *s. c.* 37 Am. Dec. 203; Elliott *v.* Abbott, 12 N. H. 549; *s. c.* 37 Am. Dec. 227, 230; Herrington *v.* Liston District Township, 47 Iowa, 11; *post*, § 3908.

[6] Pierce *v.* New Orleans Building Co., 9 La. 397; *s. c.* 29 Am. Dec. 448.

right of *consultation* with the others, and that the minority have the right to be *heard*.[1] In the line of authority establishing the foregoing principles, no break has been discovered; though it should be added that an election, or other proceedings had at a meeting irregularly assembled may be valid if *all* attend and *act* or *assent*.[2]

§ 707. Corporate Meetings Invalid unless duly Notified. — This leads to the conclusion that corporate meetings are invalid, and that the business transacted thereat is voidable, unless the

[1] Herrington *v.* Liston District Township, 47 Ia. 11.

[2] *Post*, § 712. The third section of the New York statute relating to the incorporation of religious societies made it the duty of the minister, if there were one, to notify publicly the congregation, of the time and place of holding an election. The sixth section of the same statute directed that the trustees first elected should be divided into three classes, so that one-third of the directors might be elected annually. It made it the duty of the trustees, or a majority of them, at least one month before the expiration of office of any of the trustees, to notify the same to the minister, or, in case of his death or absence, to other officers of the church, specifying the names of the trustees whose terms would expire; and it was made the duty of such minister or other officers, in the manner aforesaid, — which was held to mean in the manner provided in the third section already spoken of, — to notify the members of the church of such vacancies, and appoint the time and place for the election of new trustees to fill the same, which election was to be held at least six days before such vacancies should happen; and all such subsequent elections were directed to be held and conducted by the same persons, and in the manner before directed. It was held that the provision of the sixth section, requiring the trustees to notify the minister of the expiration of office of any of the trustees, at least a month before such expiration, was *directory merely*; and accordingly, that an election of trustees was not necessarily void because such notice was given less than one month prior to the expiration of the offices of the trustees whose successors were to be elected, and did not contain the names of such trustees, and was not announced for two successive Sabbaths; provided that the election was fairly conducted, and that all the members in fact had notice. But if the omissions were fraudulently made, or the election had thereby been prejudiced, then it was conceded by the court that the omission should invalidate the election. "The object of the notice," said Savage, C. J., "is that the voters may be fully apprised of the election, and may attend and exercise their rights. There is no pretense in this case that every voter was not present, for they appear to have come from a distance; the time was well understood, and had been the same for many years. No evil resulted from the omission, if there was any; no fraud was imputed; and all the parties attended and thereby admitted notice." People *v.* Peck, 11 Wend. (N. Y.) 604, 611; *s. c.* 27 Am. Dec. 104.

members have been duly notified of the meeting, in accordance with the governing statute or by-laws,[1] except in the case of *stated meetings*, at which every member is bound to take notice.[2]

§ 708. If the Meeting is Special, All must be Summoned.— Where a special meeting is called for the purpose of a corporate election, *all* the members entitled to vote at such meeting must be summoned, or the election will be void. This point has been ruled again and again in the English King's Bench; and it has been held that where a *single member* was not summoned, by reason of his supposed absence and the consequent inability to summon him, the election was void.[3]

[1] It was laid down in the Kings' Bench, in 1770, by Lord Mansfield and two of his colleagues, "that where there is a *usual* method of notice, that *usual method* cannot be dispensed with, nor can the election be good without complying with it, unless *all* the persons who have a right to notice are actually summoned and unanimously agree." Rex *v.* May, 5 Burr. 2681.

[2] The rules of law which are operative in this country in respect of private corporations have been derived from the principles of the common law of England applicable to the municipal corporations of that country. Those principles have been summarized by an eminent writer as follows: "Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation. Respecting notice, the courts in England adopted certain rules, which, since they form the basis of much of the statute law in this country upon the subject, and have, in the main been followed by our courts, and are founded on reason, may advantageously be here mentioned. All corporators are presumed to know of the days appointed by the charter, statute, usage, or by-laws, for the transaction of particular business, and hence no notice of such meeting for the transaction of *such* business is necessary, or for the transaction of the mere ordinary affairs of the corporation on such days; yet if it is intended to proceed to any other act of importance, a notice is necessary, the same as at any other time." Dill. Mun. Corp. (4th ed.), § 262. Where the meeting is held upon a stated day, appointed by the charter or a by-law, no notice of the meeting is required, unless the giving of notice is prescribed. Ang. & A. Corp., § 488; People *v.* Peck, 11 Wend. (N. Y.) 604; Rex *v.* Hill, 4 Barn. & Cress. 441. So, if a particular day in the year is appointed for the transaction of business, a notice of the particular business to be done is not required. Ang. & A. Corp., § 488; Warner *v.* Mower, 11 Vt. 385; Sampson *v.* Bowdoinham &c. Corp., 36 Me. 78; People *v.* Batchelor, 22 N. Y. 128. Nor is it material in what manner the stated meetings of the corporation have been fixed; if they are in fact regularly held on stated days that is sufficient. Atlantic Mutual Fire Ins. Co. *v.* Sanders, 36 N. H. 252.

[3] Kynaston *v.* Mayor of Shrewsbury, 2 Strange, 1051; Rex *v.* Liverpool, 2 Burr. 734; Rex *v.* Doncaster, 2 Burr. 744; Rex *v.* Hill, 4 Barn. & C.

§ 709. And in the Statutory Mode.—Where the *time* or *manner* of giving notice is prescribed by statute, by the charter, or by the by-laws of a corporation, it is necessary, in order to the validity of the acts done at the meeting, that the notice should be given, as thus prescribed.[1] In like manner, where the statute prescribes what the notice shall set forth, a compliance with this requirement is considered necessary to the legality of any vote at the corporate meeting.[2] Applying this principle to private corporations, it is held that acts done at a corporate meeting, of which no notice has been given in the manner prescribed by the charter and by-laws, are void; and that where no mode of giving notice is prescribed by the charter or by-laws, *personal* notice must be given to the stockholders.[3] But the rule prescribed by the *by-laws* of a corporation, as to the manner of calling meetings, is not nec-

441; Rex *v.* Theodorick, 8 East, 543; Rex *v.* May, 5 Burr. 2682; Rex *v.* Grimes, 5 Burr. 2601; Musgrove *v.* Nevison, 1 Str. 584; *s. c.* 2 Ld. Raym. 1359; Rex *v.* Mayor of Shrewsbury, Cases temp. Hardw. 147; Smyth *v.* Darley, 2 H. L. Cas. 789; Rex *v.* Langhorn, 4 Ad. & El. 538; Rex *v.* Faversham, 8 T. R. 352, per Lord Kenyon with reference to point whether all must be notified in case of special meeting: Com. *v.* Guardians, 6 Serg. & R. (Pa.) 469, 475; Loubat *v.* Leroy, 15 Abb. N. C. (N. Y.) 14; *s. c.* 65 How. Pr. (N. Y.) 138. Compare People *v.* Batchelor, 22 N. Y. 128. It was decided in the House of Lords, in 1849, that where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance; and that the omission to summon any one entitled to be summoned, renders the act done at such meeting, in his absence, invalid. Thus, the election of a treasurer for the county of the City of Dublin was vested by statute (Stat. 49 Geo. 3, c. 20) in the "Board of Magistrates of the County of said City," and was directed to take place at the Sessions Court of the city, by vote of the magistrates there present. It was held by the Lords that the Recorder of Dublin was a member of that board; that he ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid. Smyth *v.* Darley, 2 H. L. Cas. 789. A finding in a special verdict that a person entitled to be present at a meeting of the corporate body was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting, the *onus* of showing sufficient cause for his not being summoned. *Ibid.*

[1] Hunt *v.* School District No. 20, 14 Vt. 300 (1842); *s. c.* 39 Am. Dec. 225; Stockholders *v.* Louisville &c. R. Co., 12 Bush (Ky.), 62. Compare Cogswell *v.* Bullock, 13 Allen (Mass.), 90.

[2] *Ibid.*

[3] Stow *v.* Wyse, 7 Conn. 214; *s. c.* 18 Am. Dec. 99.

essarily *exclusive* of every other mode. Accordingly, it was held that, where the by-laws of an insurance company provided that a special meeting should be called by the *president*, or in his absence by the *secretary*, on application made to them in writing by ten members, this did not preclude the *directors* from calling a special meeting without such application.[1] Where the charter of an incorporated company declares that the election of directors shall be conducted according to the by-laws of the company, which fix the time and place of election, and require notice to be given, but do not specify the length of notice, and the mode of giving it, notice must be given in these respects according to the general statute law relating to corporations.[2]

§ 710. Requisites of the Notice. — The requisites of the notice may be enumerated as follows: 1. It must be issued by one who has authority to issue it.[3] 2. It must state the *time* of the meeting, unless there is a regular time fixed in the charter or by-laws, of which every member is presumed to have notice.[4] 3. The *place* where the meeting is to be held, unless the place is settled and established by the charter or by-laws.[5] 4. The *business* to be transacted thereat.[6]

§ 711. Statutory Provisions as to Manner of Giving Notice, Length of Time, etc. — In many of the States provision is made by statute for the giving of the notice in some newspaper for a stated length of time. Thus, in Missouri, notice may be given in a daily or weekly newspaper published in the place or county of the corporation, or by written notice served on each shareholder in person, setting forth the place, time and object of the meeting.[7] In New York, a *by-law* regulating the election of directors or officers of a corporation must be published for at least two weeks in some newspaper in the county in which

[1] Citizens Mutual Ins. Co *v.* Sortwell, 8 Allen (Mass.), 217.

[2] Matter of Long Island R. Co., 19 Wend. (N. Y.) 37.

[3] *Ante.* § 704; Ang. & A. Corp., § 491; Evans *v.* Osgood, 18 Maine, 213; Stevens *v.* Eden Meeting House, 12 Vt. 688; Bethany *v.* Sperry, 10 Conn. 200.

[4] *Ante,* § 701; Ang. & A. Corp., § 488; People *v.* Batchelor, 22 N. Y. 128; Atlantic Mut. Ins. Co. *v.* Sanders, 36 N. H. 252.

[5] *Ante,* § 697; Ang. & A. Corp., § 496.

[6] Sampson *v.* Bowdoinham &c. Corp., 36 Maine, 78; Warner *v.* Mower, 11 Vt. 385; Merritt *v.* Farris, 22 Ill. 303; Hunt *v.* School District, 14 Vt. 300; *s. c.* 39 Am. Dec. 225; Little *v.* Merrill, 10 Pick. (Mass.) 543.

[7] Rev. Stat. Mo. 1889, § 2484.

the election is held, at least thirty days before the election.[1] An election for directors not held at the time designated by the act of incorporation, must be held within sixty days thereafter, of which due notice must be given by the president and directors.[2] Other provisions of the statutes of that State direct annual meetings to be held, at which directors and officers are elected, and prescribe the notice, time for which it is to be given, the specification of the purpose of the meeting, — all of which is to be fixed and governed by by-laws of the corporation, — but with the reservation that such meetings shall be held at the same time and place each year.[3] In Illinois, notice shall be given at least ten days prior to the meeting, which notice shall be written or printed and deposited in the post-office, properly addressed, stating the object, time and place of the meeting.[4] Another statute of the same State, elsewhere referred to, provides for the call of meetings by stockholders owning two-thirds of the stock and provides that the secretary shall enter such call on the records of the corporation, and that the records so made shall be *prima facie* evidence of the fact of publication, mailing the notice, name of the paper in which published, dates and place of publication, etc.[5] The statute of Michigan provides for a notice of thirty days, by publication in some newspaper published in the county where the principal business of the corporation is carried on, or in some newspaper published in the city of Detroit, where the object of the meeting is general or public in its nature, or where its purpose is to authorize an application to the legislature for a change of charter.[6] In Michigan, there must be thirty days' notice of annual or special meetings in some daily paper printed in Detroit and in some newspaper printed in the county where the principal office of the corporation is situated, such notice stating the object of the meeting. Evidence of such notice is perpetuated by affidavit.[7] In Minnesota, there must be twenty days' notice of the first meeting of the corporation, setting forth the time, place and purpose of the meeting. It must either be delivered to the members personally, or be published in some newspaper of the county, or if there is none, in some newspaper in the capital of the State.[8] In the same State notice of a special meeting of a railroad company called to consider the question of consolidation with another railroad must be given for thirty days. It must state the object of the meeting and be addressed and mailed to each stockholder, or it must be given by

[1] 2 Rev. Stat. N. Y. 1882, p. 1535, § 6.

[2] 2 Rev. Stat. N. Y. 1882, p. 1535, § 6.

[3] 2 Rev. Stat. N. Y. 1882, p. 1639, § 6.

[4] Starr & Curt. Ill. Stat., p. 610, § 3.

[5] Starr & Curt. Ill. Stat., p. 617, § 22.

[6] How. Mich. Stat. 1882, § 4902–3.

[7] How. Mich. Stat. 1882, § 3317.

[8] Rev. Stat. Minn. 1881, § 4005.

publication in a newspaper, or the holding of the meeting must be authorized by the written consent of a majority of the stock.[1] In Texas, notice of a meeting to consider the question of increasing the capital stock of a railroad company must be served personally, or mailed to each member sixty days previously, and must be advertised for sixty days in some newspaper in the county through which the railroad passes.[2] In Colorado, directors (except those named for the first year) shall be annually elected by the stockholders, at such time and place as shall be directed by the by-laws of the company, and public notice of the time and place of the meeting shall be published ten days previously in the newspaper nearest the place of the operations of the company.[3] Another provision of the same statute as to annual meetings of particular corporations is to the same effect, except that it omits the clause as to notice, and makes the first Monday in January the time for holding such meetings.[4] In the same State there is a provision relating to *mining companies* to the effect that *assessments* on the capital stock can only be made by a vote of the stockholders, held at the principal office thirty days or more after the date of the call for the meeting. The notice of the meeting is signed by the president or secretary; must state the object, time and place of the meeting, and be published in the county where the operations of the company are carried on, once a week for four consecutive weeks and in some newspaper of general circulation where the principal office is located daily for thirty days,— the last publication to be ten days before the meeting,— and notice shall be served personally on or mailed to each stockholder.[5] A provision of the same statute relating to railroads requires special meetings of stockholders to be called by thirty days' personal or mailed notice, stating the time and object of the meeting.[6] By a statute of Tennessee, relating to railroads, and applicable to the first election, it is provided that when a sufficient amount of stock is subscribed, a notice, personal or by publication in a newspaper where the principal office is to be kept, is to be given of the time and place for holding an election of officers.[7] By statute in Nebraska, if there is a failure to elect at the regular annual meeting a special meeting subsequently held, after thirty days' notice in a newspaper of general circulation in the county, may hold the election.[8] A statute of Arkansas relating to the first meeting of railroad companies, provides for holding the meeting in one of the counties through which the line passes, on publication of a notice in a newspaper

[1] Rev. Stat. Minn. 1881, app. § 666.

[2] Sayle Tex. Stat. 1888, art. 4146.

[3] Gen. Stat. Colo. 1883, chap. 19, § 6.

[4] *Ibid.*, § 37.

[5] *Ibid.*, § 86.

[6] *Ibid.*, § 111.

[7] Code Tenn. 1884, § 1901.

[8] Comp. Stat. Neb. 1887, chap. 16, § 38.

in each county through which it is to pass, for twenty days previously.[1] Another statute of the same State authorizes corporations to fix the time of holding their annual meetings and also their special meetings of stockholders, but requires thirty days' notice of the time and place to be given in a newspaper published in Little Rock.[2] In Oregon, notice of corporate meetings is to be given for thirty days by publication in some weekly or daily newspaper, if published in the county where the meeting is to be held, or having a general circulation therein.[3] By the statute of Colorado, elections of directors shall be held annually at a time and place fixed by the by-laws, and ten days' notice of the meeting shall be given in a newspaper of the county of the principal office, or by personal notice.[4] By the statute of Kentucky, in case of railroad and turnpike companies, the time and place of holding the election shall be advertised by at least three insertions in a newspaper in some county in which the road is situated.[5]

§ 712. **Waiver of Notice by Appearance.** — As in the case of the *appearance* of a party defendant in a civil action, without being regularly served with process, the appearance, for all the purposes of the suit, is deemed to be a waiver of the necessity of process and a submission to the jurisdiction of the court, so as to preclude him from thereafter setting up the objection of want of formal notice or service, — so, if *all* the members of a corporation appear at a corporate meeting, without being formally notified, and proceed without objection to the business of the meeting, this will be a *waiver* by each member of the necessity of notice, or of a want of formality in giving it.[6] But if a single person, having a right to be present and vote, is absent or refuses his assent to the acts done at the meeting, its proceedings will be illegal and void.[7] This principle is qualified by an eminent writer with the statement that "it is to be observed that the foregoing rules are not applicable where they are in conflict with the charter; and hence, if this imperatively requires a *special notice*, it cannot be waived, even by the consent of all."[8]

[1] Ark. Dig. Stat. 1884, § 5425.

[2] *Ibid.*, § 5430.

[3] Hill Ann. Laws Ore., § 3226.

[4] Gen. Stat. Colo. 1883, chap. 19, § 86.

[5] Gen. Stat. Ky. 1887, p. 767, § 1, subsec. 2.

[6] Judah *v.* American &c. Ins. Co., 4 Ind. 333; Jones *v.* Milton T. Co., 7 *Id.* 547. See also People *v.* Peck, 11 Wend. (N. Y.) 604; *s. c.* 27 Am. Dec. 104.

[7] Ang. & A. Corp. 495; Rex *v.* Theodorick, 8 East, 543; Rex *v.* Gaborian, 11 East, 77.

[8] 1 Dill. Mun. Corp. (4th ed.), § 264.

§ 713. Illustrations of the Foregoing Rule. — The defendants were prosecuted by an information in the nature of a *quo warranto*, and, a verdict being found against them, they moved for a new trial. The only question was upon the validity of their election to some office in the corporation, the report does not say what. The corporation was originally a borough by prescription, but it afterwards obtained a charter. The charter prescribed no particular *place* of election; but the *usual place* was at the guild hall; and the *usual notice* was by the ringing of a bell, which used to ring at 8 o'clock, at 9 o'clock, and then to toll from 10 o'clock until the time of meeting. But the election now in question was not made at the guild hall, but at an *inn* within the town; and was upon a by-day and *without the usual notice;* for no bell was ever rung at all upon the occasion. But all the electors who were entitled to notice had *personal notice* of this meeting at the inn, and of the business to be transacted at it; and all the electors were present except *two*, and were *unanimous* in the election. The two absent electors did not live within reach of summons; and therefore it was said they had no right to notice, nor had anything to do in this matter. The court seeing no reason for a new trial, discharged the rule. Lord Mansfield said: "Nothing is more certain than that there cannot exist a valid election upon a *by-day* and by *surprise.* Notice must be given to every member who is within the limits of summons. . . . Personal summons must allow reasonable time to the person summoned. But this is only where no other method of summons or notice is established, as, for instance, by a bell, a horn, etc. Here, by the usage, the notice must be given by personal summons to those who are within the limits of the borough. But that is only *part* of the usual notice; there must also be a *bell rung* at eight and nine, and then to toll from ten to the time of meeting. This cannot be dispensed with; it is necessary to be complied with, unless every single member be present, and consents to waive it. The want of it vacates the election." [1] - - - - In another case, "the corporation were all invited to a *treat*, when one of the aldermen desired leave to *resign*, upon which his resignation was taken, and the plaintiff at the same time chosen and sworn in. Upon a trial at bar the jury found it a good election; but the court granted a new trial, it being fraudulent, and it appearing that one of the members was not there till after the election, and there was no summons to meet to do such a corporate act, that the members might come prepared. The meeting likewise was not in the *moothall*, but at a *tavern*, and it was a plain *surprise*, and even all not present." [2] - - - - The board of

[1] Rex *v.* May, 5 Burr. 2681.

[2] Musgrave *v.* Nevinson, 1 Strange, 584; *s. c.* 2 Ld. Raym. 1358, where the report is fuller.

aldermen of the city of New York appointed a day for the election of a city officer. At a subsequent meeting of the board, the *resolution* appointing such day was *rescinded*, and it was determinded to go at once into the election. Some of the aldermen were absent at the former meeting, and had no notice of the election. It was held that the election was void.[1]

§ 714. Notice Dispensed with by Unanimous Written Consent. — By statute in several of the States, it is provided that the written assent of all the members, at a meeting illegally called, will validate it.[2] By the statute of Colorado a meeting of all the stockholders, however called, at which they all sign a written consent or record of such meeting, is valid; and they may act with the same power as at a regular meeting and their acts will bind the corporation.[3] By the statute of Arkansas, the prescribed notice of the first meeting may be waived by a writing signed by all the subscribers, which notice shall specify the time and place of the meeting and be spread on the records thereof.[4] By the statute of Oregon, if all the stockholders are present at a meeting, however called, and in writing consent thereto, which consent shall be filed with their secretary, then the prescribed notice is unnecessary and the meeting is valid.[5]

§ 715. When Personal Notice Required. — Where no mode of giving notice is prescribed at all by the charter or by-laws, or where no other mode than by personal notice is thus prescribed, the rule is that *personal notice* of the meeting must be given to all the members, and that a vote passed at a meeting not so notified is not binding.[6] And where the meeting is of the *board of trustees* of the corporation, in the absence of any provision in the charter or by-laws prescribing the notice which shall be given, each member of the board must have personal notice.[7] It has been held, on obvious grounds, that a vote of a corporation,

[1] People *v.* Batchelor, 22 N. Y. 128 (Denio, J., dissenting.).

[2] Rev. Stat. Minn. 1881, § 4008; Rev. Stat. Wis. 1878, § 1761.

[3] Deer. Code Cal., part 4, § 317.

[4] Ark. Dig. Stat. 1884, § 963.

[5] Hill Laws Ore., § 3226.

[6] Wiggin *v.* Freewill Baptist Church, in Lowell, 8 Metc. (Mass.) 301; Stevens *v.* Eden Meeting-House &c., 12 Vt. 688; Lockwood *v.* Mechanic Nat. Bank, 9 R. I. 308, 333; Stow *v.* Wyse, 7 Conn. 214; *s. c.* 18 Am. Dec. 99; Savings Bank *v.* Davis, 8 Conn. 191.

[7] Harding *v.* Vandewater, 40 Cal. 77; People *v.* Batchelor, 22 N. Y. 128; State *v.* Ferguson, 31 N. J. L. 107, 124; Wiggin *v.* Freewill Baptist Church, 8 Met. (Mass.) 301; Rex. *v.* Doncaster, 2 Burr. 738; Rex *v.* Liverpool, *Id.* 723; Rex *v.* Theodorick, 8 East, 543.

which affects the liability of those of its members who are its debtors, cannot be regarded as *consented to* by them, if they were not present at the meeting at which the vote was passed, although they had legal notice of the meeting.[1]

§ 716. Must be Given for the Statutory Time. — Where the governing statute, or a valid by-law, prescribes the time which shall elapse between the giving of the notice and the meeting, the proceedings at the meeting will be voidable, unless the notice is given for the prescribed time; nor can a by-law reduce the time prescribed by the charter.[2]

§ 717. When Notice Must State Objects of Meeting. — If a particular day in each year is appointed for the transaction of *all* business, a notice of the particular business to be done is not required.[3] It has been reasoned that, where the statutory provision in regard to annual meetings is general, such meetings are, *ex vi termini*, for the transaction of all business incident to the corporate powers and interests.[4] Moreover, the notice of a *special meeting*, when it is held for the transaction of *ordinary*

[1] American Bank *v.* Baker, 4 Metc. (Mass.) 164.

[2] United States *v.* McKelden, MacArthur & Mackey (D. C.), 162.

[3] Ang. & A. Corp. § 488; Warner *v.* Mower, 11 Vt. 385; Sampson *v.* Bowdoinham &c. Corp., 36 Me. 78; People *v.* Batchelor, 22 N. Y. 128. The Civil Code of California, § 320, does not require that the notice of a special meeting of the directors of a corporation shall specify the purpose of the meeting. It is sufficient that it states that the meeting will be held, naming the time and place. In that State a mortgage was executed under a resolution passed at a special meeting of the directors. The resolution recited that written notice of the meeting had been served on each director. The purpose of the meeting was not specified in the notices. Granger *v.* Original Empire &c. Co., 59 Cal. 678; *s. c.* 9 Am. Corp. Cas. 27. It was held that the meeting was regularly called, and the mortgage valid.

[4] Warner *v.* Mower, 11 Vt. 385. The by-laws of a corporation provided that the business transacted once a year at the annual meeting should be the choice of officers; and also, in a subsequent article, that "*notice* for meetings shall specify the business to be transacted at said meetings." It did not appear that it was stated in the notice of any meeting that it was called for the choice of officers. The corporation objecting that the acts of certain directors were not binding, because they were chosen at a meeting not notified to be held for that purpose, it was held that the corporation could not be permitted, against its creditors, to assert that it had no directors capable of transacting business. Sampson *v.* Bowdoinham &c. Co., 36 Me. 78.

business, need not state the object of the meeting.[1] But where the meeting is called for the purpose of transacting business of *special importance*, not within the general routine of corporate business, upon a day not expressly set apart for that particular transaction, unless the notice of the meeting stated the nature of such business, all acts done at the meeting will be illegal and void.[2] Thus, the levying of an *assessment* upon the stockholders was held to be an act of such importance that it could not be done at a special corporate meeting, unless the stockholders were notified that such was the purpose of the meeting; [3] and the same was held in respect of the meeting of a religious corporation called for the *election of officers*.[4] A notice of a second meeting, made *conditional* upon the passage of certain resolutions to be proposed to a prior meeting, has been held invalid, and not made good by the fact that the shareholders have acquired information *aliunde* that such resolutions were passed at the first meeting.[5]

§ 718. Meeting when Confined to Subjects Expressed in Notice. — If the meeting is a special one, and if the objects of assembling it are expressed in the notice, it is confined to these objects, and the transaction of any other business will be void, unless *all* the members are *present* and *consent* to the transaction of such other business.[6] This is a principle of such importance that it has been embodied in the charters of many American municipal corporations, in the form of a provision that whenever the mayor calls a special meeting of the city council or municipal assembly, he must "specially state to them when assembled the

[1] Savings Bank *v.* Davis, 8 Conn. 191.

[2] Potter Corp., § 323; Ang & A. Corp., § 489; Rex *v.* Liverpool, 2 Burr. 723; Rex *v.* Doncaster, *Id.* 738; Rex *v.* Theodorick, 8 East, 543; People's Mutual Ins. Co. *v.* Westcott, 14 Gray (Mass.), 440.

[3] Atlantic Delaine Co. *v.* Mason, 5 R. I. 463.

[4] Smith *v.* Erb, 4 Gill (Md.), 437.

[5] Alexander *v.* Simpson, 43 Ch. Div. 139. A resolution passed at a general meeting of shareholders, under the English joint-stock companies' acts, has been held not invalidated by the fact that the notice convening it did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting. Grant *v.* United Kingdom Switchback R. Co., 40 Ch. Div. 135.

[6] Machell *v.* Nevinson, 2 Ld. Raym. 1355; People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.), 440; *ante*, § 712.

objects for which they have been convened, and their action shall be confined to such objects."[1] With such a provision in force, an ordinance passed at a meeting so called, having no reference to anything alluded to in the mayor's message, is void.[2] The English municipal corporations act, as quoted by Judge Dillon in his work on municipal corporations,[3] embodies a similar principle. The statutes of the New England States, governing *town meetings*, quite generally prescribe that the matters to be acted upon shall be specified or inserted in the notice or warning; and it is said by Judge Dillon that the courts of those States concur in requiring a faithful observance of this statutory provision; and they deny the English doctrine, applied to indefinite corporate bodies, that if all are present, notice may be waived by unanimous consent, and hold that a meeting not duly notified, though attended by all the voters capable of attending, is not a valid meeting, but its acts are void.[4]

§ **719. Illustrations.** — In a corporation by a prescription, if the right of electing common councilmen is in the common council, and they have never in practice proceeded to an election without being summoned for the purpose by the mayor, an election by *some of them*, at a corporate meeting for another purpose, is void, notwithstanding *all* the common councilmen were present at the time, had notice of the election, and might have concurred in it.[5] - - - - A meeting of a mutual fire insurance company, called "for the purpose of making such alterations in the by-laws of said company as may be deemed necessary, and for the transaction of such other business as may come before them," cannot, after voting to increase the number of directors (which is not limited by the by-laws), elect the additional directors; and an assess-

[1] Charter of St. Louis, art. 4, § 18.

[2] St. Louis *v.* Withaus, 16 Mo. App. 247; *s. c.* affirmed, 90 Mo. 646.

[3] 1 Dill. Mun. Corp. (4th ed.), § 265.

[4] In support of these conclusions, Judge Dillon cites the following cases, all of which support his text: Hayward *v.* School District, 2 Cush. (Mass.) 419; Moor *v.* Newfield, 4 Me. 44; School District *v.* Atherton, 12 Metc. (Mass.) 105; Little *v.* Merrill, 10 Pick. (Mass.) 543; Perry *v.* Dover, 12 Pick. (Mass.) 206; Reynolds *v.* New Salem, 6 Metc. (Mass.) 340; Bethany *v.* Sperry, 10 Conn. 200; Bloomfield *v.* Charter Oak Bank, 121 U. S. 121, 130; Rand. *v.* Wilder, 11 Cush. (Mass.) 294; Stone *v.* School District, 8 Cush. (Mass.) 592; Northwood *v.* Harrington, 9 N. H. 369; Giles *v.* School District, 31 N. H. 304; Lander *v.* School District, 33 Me. 239; Jordan *v.* School District, 38 Me. 164.

[5] Machell *v.* Nevinson, 2 Ld. Raym. 1355. See *ante*, § 713.

ment or call made at a meeting of the board of directors, at which only the additional directors so chosen are present, is void.[1]

§ **720. Adjournment to a Subsequent Day.** — Although the members of the corporation have been convened to do certain acts which are required to be done on a *stated day* and no other, yet if the business cannot be completed upon that day, it is competent for them to *adjourn* to a subsequent day, and *no new notice* need be sent to the members; the general rule being that a corporation may transact any business at an adjourned meeting which they could have transacted at the original meeting, without giving notice of such adjourned meeting.[2] Accordingly, where the by-laws fixed *stated days* for the meeting of the directors, and provided that when less than a quorum but more than three should be present, they might adjourn to any day prior to the next regular meeting, it was held that the acts of a majority of those present at a meeting so adjourned, were binding, although the absentees had no special notice of the adjourned meeting, other than such notice as they were chargeable with from the by-laws.[3] But this principle only applies where the meeting has been duly convened, and at the time and place regularly appointed, so that all the members have a fair opportunity of being present, and hence acquire, by the fact of adjournment, notice of the time and place of the adjourned meeting. Accordingly, where the stockholders of a corporation were notified that the annual meeting for the election of directors would be held at a certain hour of the day fixed by the charter, and the corporation was *enjoined* from holding an election on that day, in consequence of which no meeting was held until several hours after the time fixed in the notice, when a small number of stockholders, without the knowledge of the others, met, organized and adjourned until the next day, at which time an election was held by a minority of the stockholders, without notice to others, who were in the vicinity for the purposes of the meeting, and might have been readily notified, — it was held that such election was

[1] People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.), 440.

[2] Rex *v.* Carmarthen, 1 Maule & S. 696; Warner *v.* Mower, 11 Vt. 385; Schoff *v.* Bloomfield, 8 *Id.* 472; Smith *v.* Law, 21 N. Y. 296; Scadding *v.* Lorant, 3 H. L. Cas. 418.

[3] Smith *v.* Law, 21 N. Y. 296. Compare People *v.* Batchelor, 22 N. Y. 128.

invalid, whether the restraining order did or did not bind the stockholders.[1] Moreover, the power to adjourn resides in the *meeting*, and not in the *officials* appointed by law to call the meeting. When they have exercised their function of calling the meeting, they become *functus officio*, and cannot adjourn it to a future day.[2]

§ 721. Statutes Providing for Adjourned or Special Elections. — Some of the statutes provide that in case of the failure to hold an election at the appointed time, the stockholders shall meet and hold one in the manner provided by the by-laws.[3] Some of the statutes provide that if a quorum does not assemble — usually a majority in value of the stock, — the meeting may adjourn from day to day or from time to time, a record of the adjournment and the reasons therefor being kept in the journal.[4] By the statute of Colorado, if the statutory quorum does not attend, the meeting may adjourn for a period of not more than sixty days.[5]

§ 722. Statutes under which Elections Fixed and Regulated by By-Laws. — Many of the States commit the time, place and manner of holding corporate elections to the regulations of by-laws.[6] Thus, by statute in California, a corporation may, in the absence of special provisions, provide by by-laws for the time, place and manner of calling and conducting its meetings; what shall constitute a quorum; mode of voting by proxy; time of annual election of directors, and mode of giving notice thereof.[7] In Texas, the by-laws shall prescribe the manner and time of electing and the mode of filling vacancies in the office

[1] State *v.* Bonnell, 35 Ohio St. 10.

[2] Accordingly, it has been held that by the organization of the subscribers for stock at such meeting, the power of the *commissioners* appointed to receive subscriptions ceases, and they cannot *adjourn* or postpone such meeting. And if such postponement be directed by the commissioners, but the subscribers nevertheless refuse to accede to the postponement, and proceed with the election of their officers, the election will not be avoided, unless it appears to the court that a postponement was clearly necessary. Hardenburg *v.* Farmers' &c. Bank, 3 N. J. Eq. 68. The mere omission of the secretary of a private corporation to include a resolution in a communication to a stockholder who was represented by proxy at the meeting, — is held to be no *badge of fraud*, nor ground of equitable relief against the company. Thames *v.* Central City Ins. Co., 49 Ala. 577.

[3] 2 Sayle Tex. Stat. 1888, art. 4129.

[4] Deer. Code Cal., part 4, § 312.

[5] Gen. Stat. Colo. 1883, chap. 19, § 6.

[6] Ark. Dig. Stat. 1884, § 5428 (railroads after the first election); *post*, § 1050.

[7] Deer. Code Cal., part 4, § 303.

of director, and such by-laws can only be changed at annual meetings and by a majority vote of all the stock.[1] In Minnesota, corporations may, by by-laws, determine the manner of calling and conducting meetings, the quorum, the number of shares that shall entitle a member to one or more votes, and the mode of voting by proxy;[2] and the statute of Michigan is similar.[3] Another statute of the same State provides that a corporation shall be empowered to elect, in such manner as it deems proper, all necessary officers, and define their duties and obligations.[4] In Ohio corporations may, where no other provision is specially made by statute, provide for the time, place and manner of calling and conducting elections; the number of stockholders constituting a quorum; the time of holding the annual election for trustees and directors, and the mode and manner of giving notice thereof; and the manner of electing all officers other than directors.[5]

Article II. The Quorum.

§ 725. Quorum where Body is Composed of an Indefinite Number.—In the United States, where the subject is not governed by a statute or by valid by-laws[6] established by the corporation, the analogy which applies in the case of elections in municipal corporations and other public elections, is resorted to for the purpose of determining what constitutes a quorum, where the body entitled to elect consists of an *indefinite number*. In such a case, if the meeting is *regularly called*, and if those entitled to participate are duly notified where notice is required — but only on this condition, — those who actually assemble constitute a quorum, and a majority of this quorum is competent to

[1] 2 Sayle Tex. Stat. 1888, art. 4127.

[2] Rev. Stat. Minn. 1881, § 409.

[3] How. Mich. Stat. 1882, ch. 191, § 4861.

[4] *Ibid.* § 4860.

[5] Giauque's Rev. Stat. Ohio, § 3252.

[6] The power to establish by-laws, providing what shall be a quorum at corporate meetings is conferred in many States by statute, as hereafter seen. *Post*, § 965.

elect directors, or to transact any other constituent business.[1] As the number of members in a *joint-stock corporation* is indefinite, — since, although the number of shares is definite, they may be distributed among many or accumulated by a few, and by this distribution or accumulation the number of members may increase or decrease, — the rule applicable to other indefinite bodies applies to elections in joint-stock corporations. If the meeting is regularly assembled, a *majority* of those who assemble may elect, unless there is a different regulation by statute or valid by-law.[2] This rule is also applicable to *religious societies*, and to all other indefinite bodies of the like character.[3] There are judicial expressions, ancient and modern, to the effect that a majority of all the members, although in a meeting duly called, is necessary to constitute a quorum.[4] And there are more general expressions to the effect that the acts of a majority of a body politic bind the whole corporation, when confined to its ordinary transactions, and consistent with the original objects of its formation.[5] But these expressions must either be restrained to the case of a corporation in which the elective body is *definite*, as where it consists of a municipal assembly or a board of trustees or directors, a majority of whose members is necessary to a quorum; or else to cases where the language has been influenced by the terms of some statute; or else they must be understood as meaning no more than is meant by that indefinite American expression, that "the majority shall rule," which means a majority of those who come out and vote. But it must be constantly borne in mind that, whatever number may be necessary to constitute a quorum, the mode of election, unless otherwise fixed by statute, or by by-law, is that a majority of this quorum is necessary to elect, and not a mere *plurality*.[6] This principle

[1] Craig *v.* First Presbyterian Church, 88 Pa. St. 42; Everett *v.* Smith, 22 Minn. 53; Field *v.* Field, 9 Wend. (N. Y.) 305.

[2] Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. (U. S.) 525; Columbia Bottom Co. *v.* Meier, 39 Mo. 53.

[3] Craig *v.* First Presbyterian Church, 88 Pa. St. 42; Madison Avenue Baptist Church *v.* Baptist Church, 5 Rob. (N. Y.) 649.

[4] "Of common right there must be a majority of the whole present; and the majority of them must make the act." Dr. Harscot's Case, Comb. 202, per Lord Holt, C. J. See also Pierce *v.* New Orleans Build. Co., 9 La. 397; *s. c.* 29 Am. Dec. 448.

[5] Mowrey *v.* Indianapolis &c. R. Co., 4 Biss. (U. S.) 78.

[6] State *v.* Wilmington City Council, 3 Harr. (Del.) 294.

cures the effect of casting *illegal votes* to this extent, that although illegal votes may have been cast and legal votes rejected, yet, if a majority of legal votes still appear for those who are returned, their election is valid.[1]

§ 726. **Where Composed of a Definite Number.** — In the case of corporations or representative boards of corporations composed of a *definite number*, the rule of the common law is that a majority of this number must be present before any business can be transacted, but that the votes of a majority of those who are present will suffice to elect officers, or to carry any other measure before the meeting.[2] "In all cases where an act is to be done by a corporate body, or part of a corporate body, and the number is definite, it has been held that a majority of the whole number is necessary to constitute a legal meeting; and that, if the actual number is reduced from any cause, the number necessary to constitute a quorum remains the same; but that, at a legal meeting, a majority of those present may act."[3] A corporation cannot be considered as

[1] M'Neely *v.* Woodruff, 13 N. J. L. 352. To illustrate the text, take the case where the by-laws of the corporation provide that the capital stock shall consist of four hundred shares, and that no business shall be transacted at any meeting of the stockholders unless a majority of the stock is *represented.* In such a case a board of directors elected at a meeting where only 138 shares of the stock are represented, are not legally elected, and are not officers *de facto*, where another board of directors, legally elected at a previous meeting, and holding over by virtue of a by-law, claim the right to act. Ellsworth Woolen Manuf. Co. *v.* Faunce, 79 Me. 440; 10 Atl. Rep. 250; 4 New Eng. Rep. 679. There is one doubtful holding that an election of directors of a corporation by those holding *less than one-half* of the shares, brought about by the exclusion from voting of other shareholders by an *injunction* issued by a competent court, is legal. Brown *v.* Pacific Mail Steamship Co., 5 Blatch. (U. S.) 525.

[2] 2 Kent Com. 293. That this is the rule which governs meetings of *directors*, see *post*, § 3912, *et seq.*

[3] Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308; 11 Am. Rep. 253, 269. See note to Ex parte Willcocks, 7 Cow. (N. Y.) 402, 410; *s. c.* 17 Am. Dec. 525, 528; King *v.* Bellringer, 4 T. R. 810; King *v.* Miller, 6 *Id.* 268; Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 124, 137; *s. c.* 43 Am. Dec. 457; Columbia &c. Co. *v.* Meier, 39 Mo. 53; Sargent *v.* Webster, 13 Metc. (Mass.) 497; Foster *v.* Mullanphy Planing Mill Co., 92 Mo. 79, 88. Though an act of Parliament on authorizing an act, names a quorum, it is not necessary that the persons mentioned in it should expressly consent to it; but it is sufficient if they are present when it is done. The rule in such cases is that where those

composed of distinct, definite, integral parts, unless the number of the members of each class is definite; but where it is so composed, a majority of the members of each class is necessary to constitute a corporate meeting or assembly.[1] The quorum required by the principles of the common law, or by the governing statute or by-law, must not only be present at the commencement of the meeting, but it must be *present when the act is done*, the validity of which is called in question. When, therefore, the governing statute positively requires that a certain number of persons shall be present at the consummation of an act, the act is not valid, though it be begun while all are present, if one of the persons depart, though wrongfully, before it is consummated.[2] In determining whether there is a quorum, all the members are entitled to be counted, whether they are *candidates* for the office to be voted for or not. While no direct judicial authority is found upon this question, yet such is known to be the universal practice. Besides, it appears to be a matter of common right;

might be present who ought to be present, a majority can act and the assent of the minority is presumed to be included in the act of the majority: "This must be understood like similar clauses in commissions of Oyer and Terminer, peace, etc., which require the presence of the persons named in the quorum; but it was never thought, that their actual consent was necessary to every act that was done, and that if they dissented the majority could not act; but their consent has always been taken to be included in the consent of the majority." Reg. *v.* Bailiffs of Ipswich, 2 Ld. Raym. 1232; *s. c.* 2 Salk. 434; Holt, 443. Where a power of election is vested in a given number, of whom A. and B. are to be two, the *presence* of A. and B. only is requisite. The election is valid although they do not consent. Thus, where the charter of a borough provided — "If it happen any of the said capital burgesses to die or be removed, then it shall be lawful for the bailiffs, aldermen and capital burgesses for the time being, or the major part of them, *Quorum unum ballivorum et unum aldermannorum duos esse volumus*, to elect another," — it was held that, although the presence of a bailiff and alderman was necessary, in order to the validity of such an election, yet it need not appear that they assented to the choice which was made. If their assent was required, this would probably make them all electors, and take away the power of election from the body of the capital burgesses. Lord Parker, C. J., said: "This is like the case of the city of *London*, where the mayor and common council have power to do acts; and yet the act of the majority of the common council is good, though the mayor dissents. In this case there is nothing required but the presence of one bailiff and one alderman at every election, and they have no negative voices." Cotton *v.* Davies, 1 Strange, 53.

[1] University of Maryland *v.* Williams, 9 Gill and J. (Md.) 365.

[2] Ex parte Rogers, 7 Cow. (N. Y.) 526, 530, n.

for no good reason, sentimental or otherwise, is perceived by which a person holding a majority of the shares of a corporation should not be counted in making up a quorum for an election, since he has a clear right to vote his stock for himself if he sees fit, and thereby make himself one of the managers of his own property.[1]

§ 727. Statutory Provisions as to the Quorum. — The statutes are provokingly silent upon the question what number of the members, or what value of the shareholders, shall constitute a *quorum* to elect directors, or transact other constituent business. By the statutes of Illinois, the vote necessary to carry certain propositions varies from a mere majority[2] to two-thirds of the capital stock.[3] By the statute of Michigan, a majority of the stock must be voted, either in person or by proxy, at a *special* meeting, called in default of a regular meeting, for the election of directors.[4] In Texas, the consent of *two-thirds* is requisite to carry a proposition to *increase* the *capital stock;*[5] and a vote of a *majority of the stock* is necessary to elect each member of the board.[6] By the Colorado statute, elections shall be held by the stockholders in attendance, if a *majority of the stock* is represented.[7] By the same statutes a vote of two-thirds of all the stock, given either in person or by proxy, is necessary for the adoption of a resolution changing the name, the place of business, the number of directors, the amount of capital or consolidating with another company.[8] By the statute of Nebraska, the directors are chosen by ballot, by the *persons who attend* for that purpose in person, or by lawful proxy. Each share entitles the owner to one vote, and a *plurality* of the votes cast at the election is necessary to a choice.[9] By the Tennessee statute, directors are elected by a majority of the votes cast, each share having one vote.[10] By the Tennessee

[1] There is, however, a holding to the effect that an invalid election of a member of a board of directors cannot be ratified by the board, where the member whose title is in controversy is necessary to constitute a quorum in the ratifying board. People *v.* N. Y. Infant Asylum, 43 Hun (N. Y.), 640, mem.; 7 N. Y. St. Rep. 277. But it is not perceived how the board could ratify an invalid election for one of the number, any more than they could elect him in the first instance, and the case so intimates.

[2] See Starr & Curt. Ill. Stat., p. 627, § 61.

[3] *Ibid.*, p. 625, § 52, and p. 630, § 72.

[4] How. Mich. Stat. 1882, § 3317.

[5] Sayle Tex. Stat. 1888, art. 4146.

[6] 2 Sayle Tex. Stat. 1888, art. 4126.

[7] Gen. Stat. Colo. 1883, chap. 19, § 86.

[8] *Ibid.*, § 112.

[9] Comp. Stat. Neb. 1887, chap. 16, § 80.

[10] Code of Tenn. 1804, § 1706.

statute relating to *railroad* companies, the result of all elections is to be determined by a *majority of all the votes cast*, each share to represent one vote.[1] By the statute of Arkansas, a majority of the stockholders present at a legal meeting, are capable of transacting business, and each share entitles its holder to one vote.[2] By the same statutes, majority of value of the stock must be present at a *special* meeting assembled for electing directors, or else the meeting must adjourn from day to day for three days; and if a majority does not then appear, the meeting must be dissolved.[3] Another provision of the same statutes, relating to railroad companies, is that a majority, in person or by proxy, shall choose directors by ballot, each stockholder having one vote for each share of the stock which he has owned for thirty days.[4] The statute of Missouri provides that directors shall be notified, who have received a majority of the votes cast.[5] It has been held, apparently with reference to the provisions of the civil code of Louisiana, that the acts of stockholders at a corporate meeting, whereat only a minority of the stock is represented, are void, and, it has been held, cannot be ratified by the subsequent assent of the holders of a majority of the stock, if this consent be given elsewhere than at a meeting of the stockholders.[6]

§ 728. Election by a Majority of those who Actually Vote, though not a Majority of the Quorum.— Authority is found for the proposition that, where the meeting is duly convened and a quorum is present, a majority of those who *actually vote* is sufficient to a valid choice; but it is apprehended that this can be affirmed only in cases of municipal corporations, or in other cases where the elective body is *indefinite*, and where a quorum consists of those who actually assembled at the proper place and time, in pursuance of a valid notice.[7] In such a case a quorum is deemed to consist of *those who vote*, and it is by their votes that they are counted, unless some other method is prescribed by the governing statute or by-law. The doctrine of "visible quorum," established by a recent innovation in the House of Representatives of the United States, does not apply. The propriety of this ruling will be instantly perceived, if we consider the case of a municipal election. It would be quite unheard of to prove, for the purpose of overturning such an election, that a number

[1] *Ibid.*, § 1901.
[2] Ark. Dig. Stat. 1884, § 969.
[3] *Ibid.*, § 5429.
[4] *Ibid.*, § 5425.
[5] Rev. Stat. Mo. 1889, § 2484.
[6] Pierce *v.* New Orleans Building Co., 9 La. 397; *s. c.* 29 Am. Dec. 448.
[7] *Ante*, § 725.

of citizens went to the polls, and then went away without voting, and that, if this number were counted, it would appear that there was no election by a majority of the quorum. Accordingly, where a meeting for a corporate election was duly assembled, and those entitled to vote were duly notified, and a majority of those entitled to vote assembled at the time and place appointed, it being a time and place at which the election might be held agreeably to law, and the election was regularly begun, and a majority of those present who were entitled to vote, conceiving that there was no vacancy in the office, protested against any election being held, and did not vote, and the votes of the remaining minority were cast in favor of a particular candidate,— it was held that if the office voted for were *bona fide* vacant, the candidate thus receiving the votes of the minority was duly elected. The case stated was adjudged in the King's Bench in 1760. Lord Mansfield saw no doubt in the case. "Here," said he, "was an assembly *duly summoned;* one candidate was named; *no other* was named; the *poll* was *taken;* they had *no right to stop* in the middle of the election; the mayor did not put any question for adjournment, nor was there any. . . . The protesting electors had no way to stop the election, when once entered upon, but by voting for *some other* person than Seagrave [the person put in nomination] or at least against him; whereas they *only protested* against any election at that time. . . . Whenever electors are present, and don't vote at all (as they have done here), they virtually acquiesce in the election made by those who *do.*" [1] Stockholders who, at a meeting, do not vote when they might, are bound by the result.[2]

§ 729. Delegating Power of Selection to a Select Body.— In England there was a difference of opinion among the judges whether the general body of an ancient borough could delegate the power to elect burgesses, to a select body of the corporation. The question was finally decided in the affirmative in the House of Lords, on the ground that "so many by-laws of this description have been held to be good, that now it may be considered as settled that such by-laws may be made by the body at large." [3]

[1] Oldknow *v.* Wainwright, 2 Burr. 1017, 1020, 1021.

[2] State *v.* Chute, 34 Minn. 135.

[3] Rex *v.* Westwood, 2 Dow. & Cl. 21.

ARTICLE III. RIGHT TO VOTE.

§ **730. Right to Vote at Such Elections.**— Where a charter is granted to certain persons, "their *associates*, *successors* and *assigns*," the grantees can legally elect directors without having made any associates, successors or assigns.[1] Ordinarily, the right to vote rests in the member in whose name the shares stand on the *corporate books*, although in fact he may have transferred them to another.[2] It has been ruled in one case that any transfer of stock sufficient to pass the property is sufficient to entitle the transferee to vote in the election of directors, unless some specific mode of transfer is made necessary by statute or the by-laws of the company.[3] But, as hereafter seen, the governing statutes in some cases, and valid by-laws in others, provide that the shares shall be transferred only on the books of the company. In such a case, where the shares are not so transferred, although there may have been a sale of them such as will pass the right of property as between transferor and transferee, yet, as to the company, all rights in respect of them stand as though no such sale had taken place until there has been a transfer on its books. An unregistered transfer indeed passes the *equitable title*, as between the parties to the transaction, but a registration of the transfer on the corporate books is necessary to pass the

[1] Hughes *v.* Parker, 19 N. H. 181; *ante*, § 43.

[2] People *v.* Robinson, 64 Cal. 373; State *v.* Ferris, 42 Conn. 560; Hoppin *v.* Buffum, 9 R. I. 513; *s. c.* 11 Am. Rep. 291; State *v.* Pettinelli, 10 Nev. 141.

[3] People *v.* Devin, 17 Ill. 84.

legal title; and unless otherwise provided by the governing statute or by a valid by-law, the right to vote follows the legal, and not the equitable title.[1]

§ 731. Executors, Surviving Partners, Trustees, Assignees, etc. — An *executor* may vote on stock standing on the corporate books in the name of the testator, on exhibiting an exemplified copy of his testamentary letters;[2] and so may an administrator, and this without any formal transfer of the shares to him on the books of the corporation.[3] A *surviving partner* has the right, while the partnership business remains unsettled, to vote upon corporation stock standing in the name of the firm, or which, though standing in the name of the deceased partner, it is shown actually to be firm property.[4] In like manner, one is entitled to vote in respect of stock standing in his name as the *trustee* of others;[5] and for equally good reasons, where the trust is not disclosed on the company's books.[6] Stock standing on the corporate books in the name of A. B., with the addition of "*cashier*" subjoined, cannot be voted on a proxy given by his *successor* in office.[7] It is not necessary, to entitle an owner of corporate stock to vote at a corporation election, that he should be the *sole* owner.[8] Where stock in a corporation is *owned* by *two persons jointly*, and they *disagree* as to the vote to be cast upon the shares, at an election for trustees, the vote upon such stock may be rejected.[9]

[1] It has been held that, the requirement in a statute enacted to prevent fraudulent elections by incorporated companies, which directs that a list of the stockholders entitled to vote, with the shares held by each, shall be made out ten days prior to the election, is directory only, and non-compliance with it does not of itself make void the election. Downing *v.* Potts, 23 N. J. L. 66.

[2] Matter of Cape May &c. Nav. Co., 51 N. J. L. 78; 16 Atl. Rep. 191.

[3] Re North Shore Ferry Co., 63 Barb. (N. Y.) 556.

[4] Allen *v.* Hill, 16 Cal. 113.

[5] Ex parte Baker, 6 Wend. (N. Y.) 509.

[6] Wilson *v.* Proprietors of Central Bridge, 9 R. I. 590.

[7] Re Mohawk &c. R. Co., 19 Wend. (N. Y.) 135.

[8] Ervin *v.* Philadelphia &c. R. Co. (C. P. Phila.), 7 Rail. & Corp. L. J. 87.

[9] Re Pioneer Paper Co., 36 How. Pr. (N. Y.) 111. That stockholders who acquire their stock a year after a previous election have no right to vote upon it, where there has been an omission to hold an annual election as required by statute: Vandenburg *v.*

The provisions of the bankrupt act of 1867, which vest the property of a bankrupt in the assignee, and require the bankrupt, at the request of the assignee, to execute all necessary conveyances and transfers, do not take away the right of the bankrupt to vote in respect of shares of stock still standing in his name; and where the bankrupt does so vote in respect of such shares, together with the assignee, the other stockholders have no such interest in the question, whether the strict right to vote is in the bankrupt or in the assignee, as will enable them to object thereto.[1]

§ 732. Right to Vote in Respect of Shares Pledged or Mortgaged. — In the absence of a contrary rule in the governing statute or by-laws authorized thereby, the *pledgor* of shares which have been hypothecated is entitled to vote, unless the pledgee has been made a shareholder as between himself and the corporation, by having the shares transferred to him on the corporate books.[2] And it has been held without qualification, that "in a clear case of hypothecation the pledgor may vote. The possession may continue with him, consistently with the nature of the contract, and the stock remain in his name. Till enforced, and the title made absolute in the pledgee, and the name changed on the books, he should be received to vote. It is a question between him and the pledgee, with which the corporation have nothing to do.[3] On the other hand, if the stock has

Broadway Underground &c. R. Co., 29 Hun. (N. Y.), 348. Right to representation in boards of directors, as between stockholders of a parent bank and stockholders of a branch bank: State *v.* Thompson, 27 Mo. 365. Number of votes possessed by the *State* as a stockholder in a particular railway company: State *v.* New Orleans &c. R. Co., 20 La. An. 489. Case of such difficulty that the court could not decide the number of votes possessed by the *State*, but remitted it to the *legislature*: Commonwealth *v.* Bank of Pennsylvania, 3 Watts & S. (Pa.) 173. Compare Van Dyke *v.* Stout, 8 N. J. Eq. 333.

[1] State *v.* Ferris, 42 Conn. 560.

[2] Scholfield *v.* Union Bank, 2 Cranch C. C. (U. S.) 115.

[3] Ex parte Willcocks, 7 Cow. (N. Y.) 402; *s. c.* 17 Am. Dec. 525, 528. This case has been cited in subsequent cases, to the principle that a corporation has no concern with private agreements between holders of its stock and third persons. Matter of Long Island R. Co., 19 Wend. (N. Y.) 44; Matter of Mohawk &c. R. Co., *Id.* 146. It has also been cited to the principle that the pledgor of hypothecated stock may vote thereon. New York &c. R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 542, per Ingraham, J.

been transferred on the books of the corporation to one to whom it has been delivered under a contract of pledge, he is, *prima facie*, entitled to vote in respect of the shares, and after he has voted, the corporate election will not be set aside because of his having voted, although his vote determined the result. The corporation is not bound to inquire into the circumstances under which he holds as trustee, but if those circumstances are such that the pledgor has a right to a re-transfer, he may enforce that right in equity.[1] The general rule is that the right to vote remains in the pledgor or mortgagor until the pledge or mortgage has been foreclosed; and while, as elsewhere seen,[2] the inspectors of the election cannot inquire into the equities upon which the shares are held, or look behind what appears on the face of the transfer books,— yet the courts can; and if it appears to them that a pledgee of corporate stock has, *without authority* from the pledgor, caused it to be registered on the company's books in his name as trustee, they will restrain him from voting thereon.[3] Nor need the pledgor, in order to maintain an action to restrain such voting, show that his rights would thereby be injuriously affected.[4]

[1] Hoppin *v.* Buffum, 9 R. I. 513; *s. c.* 11 Am. Rep. 291. See also Vowell *v.* Thompson, 3 Cranch C. C. (U. S.) 428. To illustrate: M., the pledgee of stock which stood on the books as "M. Trustee," had repeatedly voted in respect of the shares without objection, and voted them at an election of directors under such circumstances that his vote determined the result. In *quo warranto* against the officers declared elected, it was held, (1) that M. was entitled to vote, in the absence of any claim by the pledgors to do so; (2) that after the election it was too late for the pledgors to ask the court to disturb the result. Hoppin *v.* Buffum, 9 R. I. 513; *s. c.* 11 Am. Rep. 291. The case might better have been put upon the naked ground that those in whose name the stock is registered are the only ones entitled to vote, and that if the register is not correct it should be rectified prior to the election. Compare State *v.* Lehre, 7 Rich. L. (S. C.) 234, 256. Scholfield *v.* Union Bank, 2 Cranch C. C. 115.

[2] *Post*, § 748.

[3] McHenry *v.* Jewett, 26 Hun (N. Y.), 453.

[4] *Ibid.* The owner of corporate shares pledged them. The pledgee, before the debt became due, caused a transfer to be made on the corporate books. It was held, that the pledgor was entitled, notwithstanding, to vote on the shares, and that a by-law limiting the right of voting to stockholders, requiring transfers to be made on the corporate books only, and a certified transcript as evidence of the right to vote, did not affect the case. State *v.* Smith, 15 Or. 98 (Lord, C. J., dissenting).

§ 733. **Further of this Subject.** — Statutes have been enacted in some jurisdictions confirming this right. Thus, a recent statute of Arizona provides that persons holding shares of stock of incorporated companies as security for money loaned thereon, or as security for other indebtedness, shall be prohibited from voting at any election, general, or special, of such companies.[1] It has been held that the pledgor and pledgee may *arrange by contract*, as between themselves, which one shall vote in respect of the shares.[2] But, on the contrary, it has been held that where the right to vote at corporate elections is, by the governing statute, vested in the stockholders, one to whom shares of the corporate stock has been by the corporation *transferred in trust*, under a contract of pledge for a third person who has advanced money to the corporation, cannot vote at corporate elections for directors in respect of the shares so held in pledge, although it is provided in the contract of pledge that he shall have the right to do so. The reason is plain; the governing statute having prescribed who shall vote at corporate elections, it is not competent for the corporation to make a different rule, — otherwise a corporation could make for itself a new charter, or re-create itself.[3] And again, it has been held that where stock is held under a written contract with the corporation, as security for advances made by the holders of it to the corporation, it is not competent to show by parol evidence that there was a verbal understanding that the holders of it were to have the privilege of voting in respect of the stock.[4] It has been held that, where the legal title, and with it the right to vote, is in the pledgor, and the shares stand on the books in the name of the pledgee, the pledgor has a remedy in equity against the pledgee to compel him to re-

[1] Ariz. Act March 21, 1889; Acts 1889 No. 50, p. 76; and see *post*, § 2936.

[2] Ervin *v.* Philadelphia &c. R. Co. (C. P. Phila.), 7 Rail. & Corp. L. J. 87.

[3] Brewster *v.* Hartley, 37 Cal. 15; *s. c.* 99 Am. Dec. 237. This case is cited in Griswold *v.* Seligman, 72 Mo. 122, to the point that a corporation cannot be its own stockholder; but in respect of the conclusion which the Supreme Court of Missouri deduced from this principle, that the pledgee is a shareholder and liable to creditors as such, the California decision cannot be quoted as an authority.

[4] Griswold *v.* Seligman, 72 Mo. 110. Compare Union Savings Association *v.* Seligman, 92 Mo. 635; Fisher *v.* Seligman, 75 Mo. 13; Bray *v.* Seligman, 75 Mo. 40; Erskine *v.* Lowenstine, 82 Mo. 301.

transfer the shares or else to give him a proxy to vote in respect of them.[1]

§ 734. Right to Vote in Respect of Shares Held or Owned by the Corporation Itself.— Corporations have, as hereafter seen,[2] a qualified power to deal in their own shares.[3] They may acquire them from defaulting shareholders, by forfeiture or by sale to foreclose their lien upon them,[4] — as in the case of banking corporations that have a lien upon them for a general balance due.[5] But stock thus owned or held by the corporation cannot be voted at corporate elections,[6] although it is held by a trustee in pledge, to secure a debt under a contract which allows him to vote it.[7] The reason rises to the dignity of a rule of *public policy*. It will not be permitted to a company to procure stock which the officers may wield for the purposes of an election.[8] As the right to vote in respect of stock transferred in pledge ordinarily remains in the pledgor,[9] for stronger reasons it so remains where the pledge has been made to the corporation itself.[10]

[1] Vowell *v.* Thompson, 3 Cranch C. C. (U. S.) 428. The right of a pledgee to vote is discussed in a learned note and decisions on the subject collected in 19 Am. & Eng. Corp. Cas. 533 n.

[2] *Post*, § 2054, *et seq.*

[3] Monsseaux *v.* Urquhart, 19 La. An. 482.

[4] *Post*, § 2068.

[5] *Post*, § 2320.

[6] McNeely *v.* Woodruff, 13 N. J. L. 352; Ex parte Holmes, 5 Cow. (N. Y.) 435. By statute in Missouri stock held or hypothecated to the corporation cannot be voted. Rev. Stat. Mo. 1889, § 2487.

[7] So held under the California statute in Brewster *v.* Hartley, 37 Cal. 15; *s. c.* 99 Am. Dec. 237; Ex parte Holmes, 5 Cow. (N.Y.) 426; American Railway Frog Co. *v.* Haven, 101 Mass. 398; *s. c.* 3 Am. Rep. 377, 381; Union Savings Association *v.* Seligman, 92 Mo. 635. This rule does not extend to a case where the stock is held *in trust for a stockholder*. Ex parte Barker, 6 Wend. (N. Y.) 509.

[8] Ex parte Holmes, 5 Cow. (N. Y.) 435. See also Ex parte Desdoity, 1 Wend. (N. Y.) 98; McNeely *v.* Woodruff, 13 N. J. L. 352. An agreement among stockholders of a railroad company, vesting in trustees the right to vote the stock at all meetings of the corporation, has been held void, as contrary to public policy, and as substantially amounting to a repeal of the Pennsylvania statute in regard to the right to vote incident to the ownership of railroad stock. Vanderbilt *v.* Bennett, 6 Pa. County Ct. 193.

[9] *Ante*, § 732.

[10] Where the question was whether certain shares could be voted at a corporate election, and it appeared that there was a by-law of the corporation providing that when a director was indebted to the corporation, eighty-five per cent of his stock should be considered as hypothecated and held as security, and not transferred till the debt was paid; and it appeared that some 450 shares of such stock were voted on at an election, the validity of

The rule which restrains the corporation, through its officers, from voting in respect of shares held by it, or in trust for it, has been held, under particular circumstances, to apply where the corporate funds were not used in the transactions by which the shares were deposited with its officers.[1]

§ 735. **Right of Pledgor to Proxy from Pledgee.** — It has been decided that a pledgor of stock, which stands on the books of the corporation in the name of the pledgee, may, by a suit in equity, compel a transfer to him, or oblige the pledgee to give him a proxy to vote.[2] It has also been held that the mortgagor of stock is, until foreclosure and sale, entitled to vote as a stockholder, and accordingly a decree has been passed requiring the mortgagee to give to the mortgagor a power of attorney to vote in respect of the stock until the foreclosure of the mortgage.[3]

§ 736. **No Right to Vote by Proxy at Common Law.** — At the common law all voting at every election is required to be

which was in controversy, in favor of the successful ticket, by the persons in whose names it stood, — it was held that this could not be called hypothecated stock; that hypothecation is conventional and implies the power of rendering the subject available by way of sale, to satisfy the debt on default of payment; and that as the stock stood on the transfer books in the names of the voters, this fact was conclusive upon the inspectors of the right of the voters to vote in respect of it. Ex parte Willcocks, 7 Cow. (N. Y.) 402; *s. c.* 17 Am. Dec. 525.

[1] Woodruff *v.* Dubuque &c. R. Co., 20 Fed. Rep. 91. Where the charter of an incorporated company has fixed the qualification of voters, by declaring that each share of stock shall be entitled to one vote, which may be cast by the stockholder in person or by proxy, any vote or votes cast by a party at any election of the corporation without the qualification named, is null and void, and the election will be declared and enforced without counting such votes. The right of voting conferred by the charter, is not to be tested by the mere ownership of stock, but the transfer of it must be patent on the stock-book, and where the stock of the company stands on the books in the name of an individual, as president, and has not been transferred by him on the books of the company, he has no right to vote on it, or for it, at any election. Nor can stock or shares standing on the books of the company, in the name of the corporation itself, be voted for by one of its officers. Monsseaux *v.* Urquhart, 19 La. An. 482.

[2] Hoppin *v.* Buffum, 9 R. I. 513; Vowell *v.* Thompson, 3 Cranch C. Ct. 428.

[3] Vowell *v.* Thompson, 3 Cranch C. C. 428. Compare Amhurst *v.* Dawling, 2 Vern. 401; McKenzie *v.* Robinson, 3 Atk. 559; Ivory *v.* Cox, Pr. Ch. 71.

done *in propria persona.* The only exception to this rule has been in the case of the peers of England, who have been, by license obtained from the king, allowed to make other lords of parliament their proxies to vote for them in their absence.[1] It has never been doubted that, in all elections in municipal or other public corporations, every vote must be personally given;[2] and, in the absence of a statute or valid by-law otherwise providing, the same rule applies in the case of elections in private corporations, even in those having a joint-stock.[3]

§ 737. Validity of a By-law which Provides for Voting by Proxy. — There is a difference of opinion among the American courts, as to whether a by-law of a private corporation, which authorizes shareholders to vote by proxy, is valid, in the absence of an express statutory authorization for the passage of such a by-law. Those courts which follow the analogy of the common law hold that such a by-law is invalid.[4] But other courts have taken the view that such a by-law is valid.[5] There are two reasons in support of the rule which denies the right to vote by proxy, aside from the analogy of the common law. The first is founded in the policy of requiring the personal attendance of the shareholders, in order that each may have the benefit of personal consultations with the others. The other is founded in the policy of preventing voting by fraudulent proxies.

[1] 1 Bla. Com. 168; Ang. & A. Corp., § 128.

[2] 2 Kent Com. 294.

[3] Phillips *v.* Wickham, 1 Paige (N. Y.), 590.

[4] Taylor *v.* Griswold, 14 N. J. L.) 222; *s. c.* 27 Am. Dec. 33; People *v.* Twaddell, 18 Hun (N. Y.), 427; Brown *v.* Com., 3 Grant Cas. (Pa.) 209. A charter provision that "each person being *present* at an election" shall be entitled to vote, means an actual and not a constructive presence. *Ibid.*

[5] State *v.* Tudor, 5 Day (Conn.), 329; *s. c.* 5 Am. Dec. 162; People *v.* Crossley, 69 Ill. 195; Com. *v.* Detwiller, 131 Pa. St. 614; *s. c.* 7 L. R. A. 357; 47 Phila. Leg. Int. 144; 20 Int. 20 Pitts. L. J. (N. S.) 378; 18 Atl. Rep. 990. Where the charter of a corporation authorized subscribers to vote in person or by proxy for directors at the original organization of the corporation, and empowered the directors "to adopt such by-laws, rules, and regulations . . . as may be deemed expedient to the well-being of the corporation;" and a supplement to the charter provided that the supplement should not go into effect "until approved by a majority of the stockholders present, or represented by proxy," — it was held that a by-law permitting voting by proxy was valid. Wilson *v.* Am. Academy of Music, 2 Pa. County Ct. 280.

Neither has proved sufficient, in the case of joint-stock corporations, to maintain the rule which excludes the use of proxies. A view has been taken which restrains the right to vote by proxy to mere routine matters, and which denies it in case of a vote for a fundamental change in the corporation, or a surrender of its charter.[1]

§ **738. Statutes conferring the Right to Vote by Proxy.** — The division of judicial opinion stated in the preceding section has ceased to be of much practical importance, in view of the fact of statutes existing in nearly all the States and territories providing that stockholders in private corporations may, at all meetings therefor, vote either in person or by proxy appointed in writing.[2] Some of these statutes impose restrictions upon the right. Thus, in New York, the right is granted "subject to the provisions of the act of incorporation."[3] Another statute of the same State enacts that "no member of any mutual fire insurance company, organized under the laws of this State, shall be allowed to vote by proxy for a director or directors of any such company."[4] "No share shall confer the right to vote which shall not have been holden three calendar months previous to the day of the election, nor unless it be holden by the person in whose name it appears, absolutely and *bona fide*, in his own right or that of his wife, or as executor or administrator, trustee or guardian, or in the right of some corporation, copartnership or society of which he or she may be a member, and not in trust for any other person: every person voting except females, shall do so in their own proper person and not by proxy: Provided, that this provision shall not prevent any guardian of minor children, or any *bona fide* trustee who holds stock in a fiduciary capacity, from voting upon

[1] Smith *v.* Smith, 3 Desau. (S. C.) 557.

[2] Rev. Stat. Ariz. (1887), § 300; 2 Civ. Code Cal. 1885, § 312; Gen. Stat. Col., § 242; Gen. Stat. Conn. 1888, § 1925; Laws of Del., p. 376, § 2; Const. Ill., art. 6, § 3; 2 Rev. Stat. Ind. 1888, § 3002; Gen. Stat. Kan. 1889, § 1185; Rev. Stat. Me. 1883, p. 401, § 13; Rev. Code Md. 1878, p. 321; § 52; Pub. Stat. Mass. 1882, p. 565, § 5; 1 How. Mich. Stat. 1882, § 4861; Gen. Stat. Minn. p. 450, § 160; Rev. Code Miss. 1871, p. 530, § 2406; 1 Rev. Stat. Mo. 1889, § 2484; Gen. Stat. Nev., § 806; Gen. Laws N. H. 1878, p. 356, § 21; Rev. Stat. N. J. 1877, p. 181, § 21; Comp. Laws N. M. 1884, § 196; 3 Rev. Stat. N. Y. (Banks & Brothers' 8th ed.), p. 1730, § 6; 1 Rev. Stat. Ohio, § 3245; Hill's Laws Ore., § 3223; 1 Brightly's Purd. Dig. Pa. St., p. 342, § 28; Pub. Stat. R. I. 1882, p. 368, § 3; Code Tenn. 1884, § 1706; Rev. Laws Vt. 1880, § 3313; Code Va. 1887, § 1116; 1 Rev. Stat. W. Va., p. 316, § 44.

[3] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1730, § 6.

[4] 2 Rev. Stat. N. Y. 1875, p. 668, § 70.

such stock at any election."[1] A statute of New Hampshire provides that, except in cases of railway corporations, "no stockholder shall act as proxy for any other stockholder, nor shall any person act as proxy for more than one stockholder, or vote as proxy for shares exceeding one-eighth of the whole capital stock.[2] No proxy shall confer the right to vote at more than one meeting, which shall be named therein."[3]

§ 739. **Further of the Right to Vote by Proxy.** — If the governing statute requires stock to be voted in the name standing on the transfer book, either in person or by proxy, a proxy from such person must be produced, although he is the cashier of the corporation, and a proxy from his successor in office will not be sufficient.[4] A proxy may be *revoked*, even though given for a valuable consideration, where it is about to be used for a fraudulent purpose;[5] and an *injunction* will lie to restrain the voting by proxy, in fraud and in violation of the charter of the corporation.[6]

§ 740. **Right to Vote how Affected by By-laws.** — As hereafter seen,[7] by-laws have been authorized by statute in some States which go so far as to regulate the right to vote at corporate elections; but it is scarcely necessary to say that if the right to vote by proxy is given by the charter, it cannot be restrained by any by-laws which the corporation may enact, at least against the dissent of the stockholder claiming the right. Neither can such a right, when given by the charter or by statute, be limited by a mere *resolution*, passed by the members at the meeting.[8] When, therefore, the charter provided that life members should be entitled "to vote at all elections for officers thereof by proxy," it was held that a resolution that no proxy should be voted on at any meeting of the society unless showing, within itself, that it was specifically intended to be used at such meeting, was repugnant to the charter and void, as an attempt to limit the power

[1] Bright. Purd. Dig. Pa. Stat., p. 162, § 32.

[2] Gen. Laws N. H. (1878), p. 356, § 21.

[3] Gen. Laws N. H. 1878, p. 356, § 22.

[4] Re Mohawk &c. R. Co., 19 Wend. (N. Y.) 135.

[5] Reed *v.* Bank of Newburgh, 6 Paige (N. Y.), 337.

[6] Campbell *v.* Poultney, 6 Gill & J. (Md.) 94; *s. c.* 26 Am. Dec. 559.

[7] *Post*, §§1050, 1052.

[8] Re Lighthall Man. Co., 47 Hun (N. Y.), 258.

given by the member to his proxy.[1] A regulation of a corporation that stockholders shall have one vote for each share held by them up to ten shares, and fixing the proportion which his votes shall bear to his shares above that number, is a reasonable regulation, uniform in its operation, conflicts with no law, and is binding on all the shareholders.[2]

§ 741. Injunction to Restrain Fraudulent or Ultra Vires Voting.— An injunction will be granted to restrain the voting of stock of a corporation in violation of its charter.[3] Such an injunction was allowed, where it appeared that certain shares were transferred without consideration to divers persons, and that powers of attorney were taken back by the real owners, to enable them to cast a greater number of votes than the charter would allow to the single holder of the shares.[4] The bill was not faulty for not joining the corporation by name as a party, and also the transferees of the shares, it having alleged that they were unknown.[5] But an injunction will not be granted in one State to restrain officers of a corporation from voting upon proxies of the stockholders at an approaching meeting *in another State*, upon an allegation that the statutes thereof do not provide for voting by proxy.[6] Nor will an injunction be granted at the suit of one who is a stockholder in two corporations, to enjoin the owner of a controlling interest in one of the corporations from voting at a stockholders' meeting therein, in favor of the proposition that such corporation shall engage in a certain business, on the ground that, engaging in such business would be an illegal interference with the rights of the other corporation.[7]

§ 742. Statutory Provisions as to who Entitled to Vote. — The statutes which speak upon the question almost universally prescribe that shareholders in whose names shares are standing upon the

[1] Matter of White *v.* N. Y. Agricultural Soc., 45 Hun, 580; *s. c.* 10 N. Y. St. Rep. 594.

[2] Com. *v.* Detwiller, 131 Pa. St. 614; *s. c.* 7 L. R. A. 357; 25 W. N. C. 329; 47 Phila. Leg. Int. 144; 20 Pitts. L. J. (N. S.) 378; 18 Atl. Rep. 990.

[3] Campbell *v.* Poultney, 6 Gill & J. (Md.) 94; Webb *v.* Ridgely, 38 Md. 365; Busey *v.* Hooper, 35 Md. 27.

[4] Campbell *v.* Poultney, *supra.*

[5] *Ibid.*

[6] Woodruff *v.* Dubuque & Sioux City R. Co., 30 Fed. Rep. 91.

[7] Converse *v.* Hood. 149 Mass. 471; *s. c.* 21 Northeast. Rep. 878.

corporate books, are entitled to vote.[1] In Colorado, corporate elections are by ballot, each person being entitled to as many votes as he has stock.[2] In the same State, no member of a *banking* company is entitled to vote, while his paper held by the bank or liabilities to it are due and unpaid.[3] In Kentucky, each stockholder is entitled to vote only in proportion to the amount paid on his subscribed stock.[4] In Oregon, each stockholder present in person or by written proxy, shall have one vote for each share subscribed by him; but after the first meeting no vote can be cast on unpaid stock.[5] In Wisconsin, in elections of directors by railroad companies, each stockholder is entitled to a vote, in person or by proxy, for every share of stock owned by him, for *thirty days* preceding the election. A majority of the stockholders may compel the production of books and papers to determine the qualifications of members and candidates.[6] In Michigan, each stockholder is entitled to cast, in person or by proxy, one vote on each share of stock owned or held by him ten days before election and a *majority* of the votes cast are requisite to an election, or for the determination of any question voted upon.[7] In Wisconsin, every stockholder is entitled to one vote for each share of his stock at stockholders' meetings, and on election of directors, and votes in person or by proxy (if so provided by company's by-laws); and guardians, executors, etc., may vote shares held by them.[8] In Missouri, if the right of a shareholder to vote is questioned, the inspectors should require the transfer books of the corporation as evidence of the stock held in it, and stock that has stood on those books in the name of a person for thirty days may be voted directly by such person, or by his proxy. Executors, guardians, trustees and pledgors, may vote upon stock held by them or in their name.[9] In mining companies in Colorado, corporate elections are by ballot, each shareholder casting a number of votes equal to his number of shares, and a majority of votes cast elects.[10] In the same State, shareholders vote in person or by proxy, each voter casting one vote for each share owned by him for the adoption of a change of name, place of business, number of directors, amount of capital stock, consolidation with another company — two-thirds of all the stock being necessary to such adoption.[11] In California, each person acting in person or by proxy, must be a member or *bona fide* stock-

[1] 3 Rev. Stat. N. Y. 1889 (Banks & Bros. 8th ed.), p. 1730, § 6.

[2] Gen. Stat. Colo. 1883, chap. 19, § 6.

[3] *Ibid.*, § 37.

[4] Gen. Stat. Ky. 1887, p. 769, § 2.

[5] Hill Laws Ore., § 2233.

[6] Rev. Stat. Wis. 1878, § 1822.

[7] How. Mich. Stat. 1882, § 3315.

[8] Rev. Stat. Wis. 1878, § 1760.

[9] Rev. Stat. Mo. 1889, § 2494.

[10] Gen. Stat. Colo. 1883, chap. 19, § 86.

[11] Gen. Stat. Colo. 1883, ch. 19, §§ 111, 112.

holder, having stock in his name, at least ten days before the election.[1] In Nebraska, after the first election, no person may vote on unpaid shares, or upon shares on which installments are due.[2] In Arkansas, in railroad companies, a majority by ballot, in person or by proxy, shall choose directors, and each stockholder shall give one vote for each share of his stock which he has owned 30 days.[3]

§ **743. Non-Residents and Aliens.**—In Pennsylvania, a non-resident stockholder may vote in respect of his shares, and, where no other qualification for a director is prescribed by the governing statute or by-laws than ownership of stock, he may become a director.[4] An *executor*, to whom letters of administration have been granted at the testator's domicile in another State, is a stockholder within the meaning of a statute of New Jersey;[5] and on producing before the inspectors of a corporate election an exemplified copy of his letters, he is entitled, by the principles of comity, to vote in respect of the stock standing on the company's book in the name of his testator.[6] An *alien* domiciled and holding property in Pennsylvania can vote as a stockholder and serve as a director in corporations created by the laws of that State.[7] But an *alien* stockholder cannot vote by proxy where, by the terms of the act of incorporation, the right so to vote is given to *citizen* stockholders.[8]

[1] Deer. Code Cal., part 2, § 312.

[2] Comp. Stat. Neb. 1887, chap. 16, § 80.

[3] Ark. Dig. Stat. 1884, § 5425. An executory agreement to sell and deliver to a railroad corporation reorganized under Swan & S. (Ohio) Stat. 127, bonds of the original corporation, to be assumed by the new one, does not, without the ratification of the directors and stockholders, divest the holder's title, or his voting privilege, by virtue thereof. State *v.* McDaniel, 22 Ohio Stat. 354.

[4] Detwiller *v.* Com., 131 Pa. St. 614; *s. c.* 7 L. R. A. 357; 25 W. N. C. 329; 47 Phila. Leg. Int. 144; 20 Pitts. L. J. (N. S.) 378.

[5] Rev. Stat. N. J. 184, § 39.

[6] Re Cape May &c. Co. (N. J.), 16 Atl. Rep. 191.

[7] Com. *v.* Hemingway, 131 Pa. St. 614; *s. c.* 7 L. R. A. 360; 25 W. N. C. 337; 18 Atl. Rep. 992.

[8] Re Barker, 6 Wend. (N. Y.) 509.

Article IV. Conduct of the Election.

§ **745. Appointment of Inspectors.** — Statutes exist in many States providing for the manner in which corporate elections shall be conducted. Where these exist, their provisions must be carefully attended to. Where there are no such statutes, the subject may undoubtedly be regulated by the corporation by *by-laws*, the same not being unreasonable or contrary to law; [1] and many statutes, as already seen, remit the whole subject of corporate elections to the regulation of by-laws.[2] Decisions upon such statutes are occasionally met with. A statute of New York relating to moneyed corporations requires the election of *three* inspectors of election, by the persons entitled to vote for directors, to act at the next election, any two of whom are competent to act, and also authorizes the directors to supply vacancies among the inspectors, caused by death, removal of residence, failure to serve or to attend, etc.[3] Under this statute it has been held sufficient if *two* inspectors act, whether of the class originally elected or of substitutes lawfully appointed.[4] Another statute of New York, relating to religious corporations, provides that, on the day of the election of trustees, two of the *elders* or *church wardens* shall be chosen to preside as inspectors of election, and that, if there be no such officers, then two members of the

[1] *Post*, §1050; Com. *v.* Detwiller, 131 Pa. St. 614; *s. c.* 7 L. R. A. 357; *s. c.* 25 W. N. C. 329; 47 Phila. Leg. Int. 144; 20 Pitts. L. J. (N. S.) 378; 18 Atl. Rep. 990.

[2] *Ante*, § 722; *post*, § 967.

[3] 2 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1556, §§ 195, 196.

[4] Re Excelsior Fire Ins. Co., 16 Abb. Pr. (N. Y.) 8.

church, to be nominated by a majority present, shall preside at such election. With this statute in force, it has been held that inspectors appointed by the pastor, not being elders of the church, at a meeting at which there were elders present who might be appointed, was such a violation of the statute as rendered the election of no validity.[1] By a statute of Ohio[2] the right to choose inspectors of elections is vested in the stockholders, and not in the directors.[3] But where, as in New York, the appointment is vested in certain officers, and an emergency arises from the fact that the offices are vacated whose officers are vested with the power, it has been held competent for the *corporators* themselves to exercise the power of election, and provide for the appointment of inspectors for that purpose.[4] But the *president* of the corporation has no power to assume the office of inspector, and to pass upon the right of a member to vote in respect of a proxy, unless the charter or by-laws give him such power, — though the member, by *acquiescing*, may *estop* himself from claiming that he was thereby deprived of the right to vote.[5] The fact that a shareholder is a *candidate* for the office of director has been held not to disqualify him from acting as an inspector at an election.[6] But when the inspectors who acted at a corporate election were selected at a meeting at which only the president of the corporation and a director were present, who appointed themselves and another director such inspectors, and the full board was composed of nine directors, it was held that the election was *void*.[7] An election, otherwise valid, will not be set aside on the ground that the inspectors were not *sworn* in the form prescribed by the statute;[8] or because the *oath*, actually administered to the inspectors, was not *subscribed* by them.[9]

§ 746. Statutory Provisions as to Appointment of Inspectors. — By statute in Missouri, corporations with ten or less resi-

[1] People *v.* Peck, 11 Wend. (N. Y.) 604; *s. c.* 27 Am. Dec. 104; more fully stated, *post* § 747.

[2] Rev. Stat. Ohio, § 3245*d*.

[3] State *v.* Merchant, 37 Ohio St. 251.

[4] Matter of Wheeler, 2 Abb. Pr. (N. S.) (N. Y.) 361.

[5] State *v.* Chute, 34 Minn. 135.

[6] Ex parte Willcocks, 7 Cow. (N. Y.) 402; *s. c.* 17 Am. Dec. 525.

[7] Ex parte Willcocks, 7 Cow. (N. Y.) 402; *s. c.* 17 Am. Dec. 525.

[8] Chenango &c. Ins. Co., 19 Wend. (N. Y.) 635.

[9] Matter of Wheeler, 2 Abb. Pr. (N. S.) (N. Y.) 361.

dent stockholders, may, by *by-laws*, regulate the appointment, number and qualifications of inspectors of corporate elections.[1] By the statute of Oregon, the *president* of the corporation is the inspector and certifies who are elected as directors.[2] By the statute of Missouri, if the object of a corporate meeting be to elect directors or to take the vote of the stockholders on any proposition, the *president* shall appoint not less than two shareholders, who are not directors, as inspectors, who shall receive and canvass the votes cast at the meeting and certify to him the result.[3] By the statute of Nebraska, relating to the first election held by railroad companies, the persons named in the certificate of incorporation, or such of them as shall be present, shall be inspectors of the election.[4] By the statute of New York, at a special election called in default of a regular election to elect directors, the stockholders shall elect two or more inspectors of the election.[5] By the statute of Oregon, relating to the first meetings of the stockholders of any private corporation, the incorporators present at the meeting shall be inspectors of the election, and shall certify who are elected directors.[6] By the statute of Wisconsin, relating to elections for directors of railroad companies, the inspectors shall be appointed in the mode pointed out by the *by-laws*;[7] and the directors are elected at the time, in the manner, and for the term fixed by the by-laws.[8] By a statute of Ohio, within 15 days before meeting for election of directors, or determining any question by the stockholders, or by subscribers to stock, or stockholders and creditors of corporation for organization, any one entitled to vote at said meeting owning one-tenth interest in corporate stock may apply to a court of common pleas, or if the court is not in session to any judge thereof, or if the judge is absent or under disability to probate court of county in which the meeting is to be held, for the appointment of inspectors of such election. But notice must be served on corporation, and court may require newspaper publication.[9] If court deems such appointment proper, it shall appoint three disinterested persons as inspectors, retaining the right to vacate one or all such appointments and supply them with others. If any inspector fails to come, his vacancy may be supplied by the stockholders.[10] By a statute of Arkansas, relating to the first election of directors of a railroad company, the commissioners for opening books of subscription named in the articles

[1] 1 Rev. Stat. Mo. 1889, § 2484.

[2] Hill Laws Ore., § 3227.

[3] 1 Rev. Stat. Mo. 1889, § 2484.

[4] Comp. Stat. Neb. 1887, chap. 16, § 80.

[5] 3 Rev. Stat. N. Y. 1889 (Banks & Bros. ed.), p. 1726, § 3.

[6] Hill Laws Ore., § 3223.

[7] Rev. Stat. Wis. 1878, § 1822.

[8] *Ibid.*

[9] Rev. Stat. Ohio (Giauque), § 3245*a*.

[10] Rev. Stat. (Giauque), § 3245*b*.

of association shall be inspectors of the election.[1] By statute in New York and Missouri, inspectors must take and subscribe the following oath: "I do solemnly swear that I will execute the duties of inspector of the election now to be held with strict impartiality and according to the best of my ability." [2]

§ 747. Instance of an Election Void because Inspectors Illegally Appointed. —The third section of the statute of New York, for the incorporation of religious societies, provides that on the day of the election of trustees two of the *elders* or *church wardens* shall be chosen to proceed as inspectors of the election; and if there are no such officers, then two of the members of the church, to be nominated by a majority present, shall preside at such election. In a case under this statute it appeared that the church was divided into two factions, one of which was attached to the clergyman and the other to a member named Knapp, who acted in opposition to the clergyman. The Knapp faction worshiped elsewhere from the regular meeting-house, but were entitled to attend and participate in the election of trustees. Such an election took place under the following circumstances: The pastor had assembled the congregation for the purpose of delivering an address to the scholars of the Sunday-school. Immediately after the conclusion of the address, and before leaving the pulpit, he announced that the time had arrived for the election of trustees, and he immediately nominated two members of the church, *who were not elders*, to preside as inspectors. A number of the opposing faction, who had remained outside the church, not expecting that such a *coup d'etat* as this would take place, crowded into the church and objected to these persons acting as inspectors, on the ground that they were not elders. Whilst the question was under discussion, the pastor proposed that certain resolutions should be read, which had been passed by the church on the morning of that day, containing censures of certain members, and designating those who had a right to vote. The question was put, and the reading of the resolutions was ordered by a majority of the meeting, and one of the inspectors commenced reading them. Thereupon a disturbance arose, in the midst of which Mr. Knapp, the leader of the opposing faction, who was a trustee of the church, nominated two deacons of the church (who it seems from the opinion of the court, were elders), as inspectors of the election, and put the motion to vote. It was carried by a number of voices, and not dissented to by any. Then there was a scramble for the ballot box. The faction attached to Mr. Knapp suc-

[1] Ark. Dig. Stat. 1884, § 5427.

[2] Rev. Stat. Mo. 1889, § 2485; 2 Rev. Stat. N. Y. 1882, p. 1536, § 6.

ceeded in obtaining it. They held their election immediately in one part of the church, while the faction attached to the pastor held their election in another part. Thus there were two elections held, which resulted in the election of two sets of trustees. The inspectors of the faction adhering to Mr. Knapp issued certificates of the election to those who had been chosen at the election held by them, and, for some reason not disclosed, they issued new certificates six months later. On an information in the nature of a *quo warranto* brought, on the relation of those who had been chosen trustees by the faction adhering to the pastor, there was a verdict and judgment in favor of the defendants. It was held that the verdict was well supported by the evidence, and that the judgment was according to law. The conduct of the pastor, in proceeding in the manner in which he did, was censured by the court; and it was held that the inspectors appointed by him, not being elders of the church and there being elders present who might be appointed, their appointment was in violation of the statutes and illegal, and that the pretended election held by them was of no validity. It was further held that the election held by the opposing party under inspectors who had been chosen by those present without any dissenting voices, which inspectors were qualified to act under the statute, was legal and valid, and hence that the trustees chosen by them were entitled to their offices.[1]

§ 748. Their Duties in Conducting the Election.— If the charter or governing statute prescribes the mode of conducting the election, that must be followed; if not, then the mode prescribed by the by-laws, if there are such and if they are valid, must of course be pursued; but an election which conforms neither to the charter nor to the by-laws may be held void.[2] In the absence of a statute,[3] it seems that the duties of the inspect-

[1] People *v.* Peck, 11 Wend. (N. Y.) 604; *s. c.* 27 Am. Dec. 104.

[2] Thus, where there was a charter provision requiring the mayor of the borough to be chosen out of the capital burgesses, twenty-four in number, and there was also a custom founded on a by-law, by which the burgesses at large first named five burgesses out of the whole number, and from this five the mayor was elected; and instead of pursuing this mode, the burgesses at large nominated eight of their number, out of which number the mayor was elected,— it was held that the election was void, because it pursued neither the charter nor the by-law. "It is not under the charter, for that says it must be out of the capital burgesses at large, and here they confined themselves to eight; nor is it according to the usage (founded on the by-law), because more than five were nominated; which brings in all the confusion that was designed to be avoided by that provision." Barber *v.* Boulton, 1 Strange, 314.

[3] By a recent statute of Pennsylvania, "the certificate of stock and transfer books, or either, of any cor-

ors are *ministerial* merely, and that, in case the right of a member to vote is *challenged*, they must determine the right by what appears on the transfer books of the company, and cannot look beyond them,[1] or inquire into the equities on which the stock is held,[2] or require the corporator to prove his *right* to vote by his *oath*, as in the case of a public election, when such right is challenged.[3] Under the statutes of New York, in the case of an election in a *religious corporation*, after the ballots have been received by the inspectors, without challenge or objection, their right to inquire into the character of the voter ceases. The only duty which remains for them to perform is to *count the ballots*, and return the number of votes received, and the names of those having the greatest number.[4]

§ 749. **Cannot Pass upon Validity of Proxies.**— The inspectors of election have no power to try and determine the genuineness of the proxies offered by the members present; but if a proxy is *apparently* the act of a stockholder, and regular on its face, they must admit the right to vote in respect of it.[5]

poration . . . shall be *prima facie* evidence of the right to vote thereon, by the person named therein as the owner, either personally or by proxy." But, on objection by a stockholder, that the stock is not owned absolutely and *bona fide* by such person, the judges of election shall inquire into and determine the question summarily, and if found to be not so owned, his votes shall be rejected; and in such a case the beneficial owner thereof shall be entitled to vote. Penn. Act May 7, 1889; Pub. Laws Penn. 1889, No. 108, p. 102.

[1] Matter of Long Island Railroad, 19 Wend. (N. Y.) 37.

[2] People *v.* Kip, 4 Cow. (N. Y.) 382, note.

[3] People *v.* Tibbetts, 4 Cow. (N. Y.) 358; People *v.* Kip, 4 Cow. (N. Y.) 382, note. The act of incorporation of a bank provided "that each stockholder shall be entitled to one vote for each share of the stock of the bank, which he shall have held in his own name at least fourteen days previous to the time of voting." It was held, under this statute, that the inspectors of an election of the corporation had no right to inquire beyond the legal ownership of the stock for the length of days prior to the election mentioned; that it was not competent for them to pass a by-law under which the inspectors of the election might inquire upon the oath of persons offering to vote, into the equities upon which they held the shares of stock in respect of which they tendered their votes. People *v.* Kip, 4 Cow. (N. Y.) 382, 384, note.

[4] People *v.* White, 11 Abb. Pr. (N. Y.) 168; Hart *v.* Harvey, 32 Barb. (N. Y.) 55; *s. c.* 10 Ab. Pr. (N. Y.) 321; 19 How. Pr. (N. Y.) 245.

[5] Re Cecil, 36 How. Pr. (N. Y.) 477. Thus in an election of officers of a corporation, one stockholder claimed to represent another as proxy, and

They cannot reject a written proxy, regular in form and apparently the act of the stockholder, on the ground that it is not *acknowledged* or proved by a *subscribing witness*.[1] But the mere announcement by the *president*, that a proxy which has been presented cannot be voted upon, does not entitle the holder to complain, if he *acquiesces* and refrains from offering the vote upon it when the vote is taken; for the action of the president being unauthorized and nugatory, his vote has not been in fact excluded.[2]

§ 750. **Irregular Ballots.** — The *intention* of the elector cannot be inquired into, even in a proceeding in the nature of a *quo warranto*, except in so far as it can be discovered in the ballot which he has deposited in the box. It is not permissible to prove that he intended to vote for one man, when he actually cast his ballot for another man.[3] Thus, if two ballots be *folded together*, one for one candidate and the other for the opposing candidate, it is inadmissible to allow the person who deposited them to prove by his oath, for which candidate he intended to vote.[4] So, it has been held that where, at an annual town meeting, the electors had limited the *number* of constables *to be chosen* to four, ballots containing the names of more than four persons, designated as voted for for the office of constable, could not be canvassed, but must be rejected, since it could not be told which ones were really the choice of the voter.[5] But a ballot cast for a candidate for office, in which only the *initial letters of his Christian name* are inserted, — as J. R. Eastman for John R.

showed a power of attorney. He also had a letter of instructions, of which he informed the inspectors, but they, without asking to see it, rejected the proxy, on the ground that the omission of the date in the power of attorney excited their *suspicions*. It was held that the proxy should have been received. Re St. Lawrence Steamboat Co., 44 N. J. L. 529.

[1] Matter of Cecil, 36 How. Pr. (N. Y.) 477.

[2] State *v.* Chute, 34 Minn. 135; *s. c.* 24 N. W. Rep. 353.

[3] Loubat *v.* LeRoy, 15 Abb. Pr. (N. S.) (N. Y.) 14.

[4] People *v.* Seaman, 5 Denio (N. Y.), 409, 412.

[5] People *v.* Loomis, 8 Wend. (N. Y.) 396. A meeting of the directors of the branch bank was called to choose three directors. At this meeting, a part of the stockholders voted a ticket having three names on it. The number of tickets voted with five names was two hundred and twelve, of the tickets with three names eighty-eight. The three candidates were declared elected. Held, that they were duly elected. State *v.* Thompson, 27 Mo. 365.

Eastman, — is a legal ballot for the person designated by such initials, provided that it be found, in a proceeding in the nature of a *quo warranto*, by the verdict of a jury, that he was the person whom the electors *intended* to designate by such name.[1]

§ **751. The Count.** — Under the provisions of the New York statute relating to *religious corporations*, the judges of an election for trustees of a religious corporation have no power to pass upon the qualifications of voters, and reject votes after they have been once received. The reason is, that the voter is entitled, when he is challenged, to be *heard*, and that the judges cannot be presumed to know the contents of the ballot so as to separate the legal from the illegal.[2]

§ **752. Votes for Ineligible Candidates "Thrown Away."** — Votes which the returning officers are clearly bound not to count, stand precisely the same as no votes at all, and those who cast them are deemed to have assented to the votes which were lawfully cast. It was so held in an old unreported case of a corporate election, "where ten voted for Roberts and ten for Boscawen, a non-inhabitant: the votes given for the non-inhabitant where inhabitancy was necessary, were holden to be thrown away."[3] In another case, "where, out of eleven voters, five voted and six refused, the court held that the six virtually assented."[4] This case is said, in a note, to have been a case concerning "an election of a burgess of Westbury upon a single vacancy. Six voted for Withers singly; six others voted for two persons jointly, though it was upon a single vacancy. The court held clearly that the double votes were absolutely thrown away, and refused to grant an information against Withers."[5] A more recent authority is to the effect that votes cast for a *candidate* who is *ineligible* will not be discarded, so as to give the election

[1] People *v.* Seaman, 5 Denio (N. Y.), 409. See also People *v.* Ferguson, 8 Cow. (N. Y.) 102.

[2] Hartt *v.* Harvey, 10 Abb. Pr. (N. S.) (N. Y.) 331.

[3] Reg. *v.* Boscawen, cited 2 Burr. 1021, note. The same is said to have been ruled in the case of Taylor *v.* Mayor of Bath, temp. Ld. Ch. J. Lee, B. R.

[4] Rex *v.* Withers, as quoted by Mr. Justice Wilmot in 2 Burr. 1020.

[5] *Ibid.*, 2 Burr. 1020, note.

to a candidate having a *minority* of votes, unless the electors knew of the ineligibility of the candidate voted for.[1]

§ 753. **Cumulative Voting.**—For the protection of the rights of minorities in corporations, and in order to prevent a majority of the shareholders from filling the board of directors with themselves or their nominees, the principle of *cumulative voting* at elections for directors has been devised and established, in several States by constitutional provisions, and in others by statutory enactments. The theory of these provisions is that any shareholder may, at his pleasure, vote for an entire ticket, so to speak, that is, for as many persons as there are directors to be elected, or he may cast for one particular director as many times the same number of votes as there are directors to be elected. To illustrate: suppose that there are five directors to be elected, and a particular shareholder is entitled to vote in respect of one-fifth of the shares. He may cast one vote for five persons named on his ballot, or he may cast five votes for one person,— and so in that proportion.

§ 754. **Constitutional Provisions as to Cumulative Voting.**— "In all elections for directors or managers of corporations, every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner, except that members of co-operative societies formed for agricultural, mercantile and manufacturing purposes, may vote on all questions affecting such societies in manner prescribed by law."[2] - - - - "The general assembly shall provide by law that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be

[1] Re St. Lawrence Steamboat Co., 44 N. J. L. 529. Inspectors of an election for directors have no power to pass upon the eligibility of the person for whom the votes are proposed to be cast. The question of eligibility can only be raised in the courts. Re St. Lawrence Steamboat Co., 44 N. J. L. 529.

[2] Cal. State Const. 1879, art. 12, § 12.

elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner."[1] - - - - "In all elections for directors or managers of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company, multiplied by the number of directors or managers to be elected at such election; and each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner."[2] - - - - A similar provision exists in the present constitution of Pennsylvania.[3] It was held to be *self-enforcing*, and not merely directory to the legislature.[4]

§ 755. Statutory Provisions as to Cumulative Voting. — The right of cumulative voting is also provided for in many of the States by statute. Thus, in Illinois, following the constitution of that State, it is provided that every subscriber shall have the right to vote, in person or by proxy, for his number of shares, for as many persons as there are directors or managers to be elected, or may consolidate his votes and cast as many for one candidate as the number of his shares, multiplied by the whole number to be elected or to distribute them on the same principle among as many candidates as he shall think fit; and that directors or managers may not be elected in any other manner.[5] A similar provision exists in Kansas, but with the proviso that, in elections of directors for *corporative associations*, no stockholder shall be allowed to cast more than one vote multiplied by the number of directors of the association.[6] In Missouri, in elections for directors or managers, each elector shall cast as many votes as he has shares of stock, multiplied by the number of directors or managers to be elected, and he may distribute said votes among *two or more candidates*, or cast

[1] Ill. Const. of 1870, art. 11, § 3.

[2] Mo. Const. of 1875, art. 12, § 6. Const. Idaho, 1889, art. 11, § 4 (except the word "legislature" used instead of "general assembly"); Const. Montana, 1889, art. 15, § 4 (except that the words "legislative assembly" are used instead of "general assembly," and the words "directors or trustees" are used instead of the words "directors or managers"); Neb. Const. 1875, art. 11, § 5, with unimportant verbal variations; W. Va. Const. 1872, art. 11, § 4 (substituting the word "legislature" for "general assembly").

[3] Const. Penn. 1874, art. 16, § 4.

[4] Pierce *v.* Commonwealth, 104 Pa. St. 150.

[5] Starr & Curt. Ill. Stat., p. 610, § 3.

[6] Gen. Stat. Kan. 1889, § 1185.

all for one. This mode of election is exclusive.[1] Similar provisions exist in Texas.[2] In California, the statute provides that all elections shall be by ballot, each person having the right to vote, in person or by proxy, all the shares standing in his name at least ten days before the election, for as many persons as there are directors to be elected, or cumulate and give *one candidate* as many votes as his number of shares multiplied by the number of directors to be elected, or distribute them on the same principle among the candidates, as he sees fit. In corporations having no capital stock each member may give one director as many votes as there are directors to be elected.[3]

§ 756. Judicial Decisions on the Subject of Cumulative Voting. — This right of cumulative voting does not exist, unless it is expressly conferred by an operative constitutional provision or statute.[4] Constitutional provisions of this kind are *not retroactive*.[5] They do not operate upon existing charters, unless such charters are subject to the power of the legislature to modify or repeal them, under principles elsewhere stated.[6] Construing the provision of the Missouri constitution, it has been reasoned that, although the language is broad enough to include all corporations, those previously in existence as well as those thereafter to be created, yet, on a familiar rule of interpretation, it would not be regarded as applying to corporations previously created with an express exemption in their charters from the operation of the general law by which the legislature was authorized to repeal, alter, or suspend the charter of every corporation. An intention thus to interfere with existing franchises would not be imputable to the convention which framed the constitution, unless their purpose had been couched in explicit language. If such were the purpose of the constitutional provision, it would be void under the Federal constitution, as interpreted in the Dartmouth College Case,[7] in respect of such prior corporations,

[1] 1 Rev. Stat. Mo. 1889, § 2490.

[2] 2 Sayle Tex. Civ. Stat. 1888, art. 4128.

[3] Deer. Code Cal., vol. 2, § 307.

[4] State *v.* Stockley, 45 Ohio St. 304; 19 Am. & Eng. Corp. Cas. 143; 13 Northeast. Rep. 279; 11 West. Rep. 259; 2 Rail. & Corp. L. J. 474.

[5] Baker's Appeal, 109 Pa. St. 461 State *v.* Greer, 78 Mo. 188; reversing *s. c.* 9 Mo. App. 219.

[6] *Ante*, § 89.

[7] Trustees of Dartmouth *v.* Woodward, 4 Wheat. (U. S.) 518. See also Sloan *v.* Railroad Co., 61 Mo. 24, 30; Scotland Co. *v.* Railroad Co., 65 Mo. 123, 135.

as impairing the obligation of the contract subsisting in the special charters granted them by the legislature and accepted by them. Nor was it an answer to this position to say that the right of voting, under the prior system, was not a right of substantial value, upon the faith of which corporators could be supposed to have embarked their capital in corporate enterprises.[1] Nor, in the opinion of the Supreme Court of Missouri, could such a constitutional provision be upheld on the theory of being a necessary police regulation, and hence not within the doctrine of the Dartmouth College Case.[2] On principles elsewhere discussed,[3] it is *not competent* for the *directors* of a corporation, to accept for the corporation such a constitutional provision; since such an acceptance involves a constituent change in the corporation, which requires unanimous consent,[4] or according to one view, the concurrence of a majority in value, by a regular vote at a meeting duly called for that purpose.[5] An election held for seven directors of a private corporation created under Pennsylvania general corporation act of 1873, at which the cumulative system of voting was employed, and five directors only received the necessary pluralities, is valid as to the five so elected, and they have full power to act as a board, even though two remaining directors were not chosen.[6]

§ 757. **Certificate of Election.** — If the statute requires the inspectors to make out and give to the successful candidates a *certificate* of their election, it may become a question what force and effect are to be ascribed to such a certificate; and here, as in other cases, the language of the applicatory statute must be carefully considered. The subject is illustrated by several of the earlier cases in New York, where such a statute was in existence. In one of them it was laid down that a certificate is *not essential* to enable a person elected a trustee to take the office; and that if the inspectors neglect or refuse to give a certificate,

[1] State *v.* Greer, 78 Mo. 188; reversing *s. c.* 9 Mo. App. 219. Compare Hays *v.* Com., 82 Pa. St. 518, 523, cited by both of the Missouri courts.

[2] State *v.* Greer, *supra;* citing Thorpe *v.* Rutland &c. R. Co., 27 Vt. 140; Sloan *v.* Pacific R. Co., 61 Mo. 24; Broom Leg. Max. 394.

[3] *Ante,* § 86.

[4] *Ante,* § 71, *et seq.*

[5] Baker's Appeal, 109 Pa. St. 461.

[6] Wright *v.* Commonwealth, 109 Pa. St. 560.

the party entitled to the office may have his right to it declared in a judicial proceeding.[1] Again, it has been held, under the same statute, that a certificate, under the hands and seals of the inspectors of the election, that a person has been duly elected a trustee, is *prima facie evidence* of his right to the office. But this applies only to certificates which have no vitiating quality on their face. If a certificate recites facts which show that the persons whom the inspectors have declared to be elected were not elected, of course it is not evidence of their right to the office, but, on the contrary, it demonstrates that no such right exists. The reasoning is that the statute merely provides that the certificate shall entitle the party who has been *elected* to hold the office. It is the *fact of the election*, and not the possession of the certificate, which lies at the foundation of the right. Where there is no election there is no right, and the certificate cannot create a right. The certificate being merely *prima facie* evidence of the right, it is competent to go behind it and inquire into the facts of the election.[2] The established principle seems to be that, in a proceeding in the nature of a *quo warranto* to try the title to a public or corporate office, it is competent to go behind the certificate of election, which has been given by the proper authority to the defendant, which certificate would otherwise be conclusive, for the purpose of ascertaining the real facts of the case.[3]

[1] People *v.* Peck, 11 Wend. (N. Y.) 604, 611.

[2] Hartt *v.* Harvey, 10 Abb. Pr. (N. Y.) 321.

[3] People *v.* Seaman, 5 Denio (N. Y.), 409; People *v.* Ferguson, 8 Cow. (N. Y.) 102; People *v.* Vail, 20 Wend. 12; People *v.* Van Slyck, 4 Cow. (N. Y.) 297. Thus, it is held in New York that it is competent, in a proceeding by an information, in the nature of a *quo warranto*, to go behind the certificate of the county canvassers as to the town canvass, and rectify an error in the statement of the inspectors; and it appearing that the votes in a particular town were regularly canvassed, and that the inspectors set down, on what they called a canvass sheet, the number of votes given to each of the candidates for the office contested, but in making their final statement, after stating the whole number of votes, they omitted, by mistake, to add how many were given to each of the persons voted for by the electors, — it was held competent to hear evidence tending to show that the relator, and not the defendant, had been elected by the greater number of votes; and accordingly it was adjudged by the court, contrary to the certificate of the county canvassers in the particular case, that the relator was duly elected. People *v.* Vail, 20 Wend. (N. Y.) 12.

§ 758. Statutory Provisions as to Conduct of Elections. — By the statute of Missouri, the meeting shall convene at 9 a. m. and continue three hours, unless its object is sooner accomplished. But if it be convened for any other purpose than holding an election or voting on a proposition, it shall be regulated by the *by-laws*, as to the manner and time of convening it and the manner of conducting it.[1] By the statute of New York, when the right of any person to vote is challenged, the inspectors shall require the transfer books of the company, and from those books shall decide the challenge; and all shares standing on such books in the name of any person shall be voted by him or by his proxy, subject to other provisions of the statute.[2] By a statute of Ohio, an agent of the corporation, must make out a list of stockholders from the transfer book, showing number and class of shares of each on date of closing transfers before the meeting, and if no such time is fixed, ten days before the meeting. This shall be given to the inspectors, and shall be *prima facie* evidence of the ownership of stock. In case this is absent, inspectors shall ascertain the ownership by corporate books, certificates of stock, or other satisfactory proof. They shall receive and count the votes cast at such meeting, or at any adjournment thereof, either upon an election, or for the decision of a question, and determine the result, and their return shall be *prima facie* evidence thereof.[3] By the statute of Arkansas, applicable to railroad companies, the inspectors appointed by the commissioners must openly count the votes and declare the result, and within 10 days file a certificate, subscribed by a majority of them, with the Secretary of State, and with county clerk in each county through which proposed line passes.[4] By statute in New York, when the directors of any corporation shall neglect to adopt a *by-law* providing for the annual election of directors, for sixty days after the first year of corporate existence, the stockholders may elect directors in the place of the directors holding over, in the manner pointed out by such statute. If at the meeting held to elect such directors, the books of the corporation, showing who were and are stockholders of the association, are absent, each stockholder, in order to be entitled to vote at such election, must make or present a statement in writing signed and verified by him, setting forth the number of shares of the stock of such corporation standing in his name on its books and upon which he is entitled to vote, and file the same with the inspectors of election. Thereupon he is entitled to vote on such stock, so appearing to be owned by him, and standing on the books of the corporation in his name.[5]

[1] 1 Rev. Stat. Mo. 1889, § 2484.

[2] 2 Rev. Stat. N. Y. 1882, p. 1535, § 6.

[3] Rev. Stat. Ohio (Giauque) § 3245 (5).

[4] Ark. Dig. Stat. 1884, § 5427.

[5] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1726, § 3.

Article V. Right to the Office: Contesting the Election.

§ 761. Inadequacy of the Remedy by Certiorari. — In case of the illegal election or appointment of *public officers* or the legal removal of such officers, a remedy frequently resorted to is the common law *certiorari.* This remedy has been considerably used in New York.[1] But the inadequacy of the remedy by *certiorari* has been perceived in that State,

[1] As to the use of this remedy in such cases, see Wood *v.* Peake, 8 Johns. (N. Y.) 69; Wildy *v.* Washburn, 16 Johns. (N. Y.) 49; Lawton *v.* Commissioners, 2 Caines (N. Y.), 179; People *v.* Van Slyck, 4 Cow. (N. Y.) 297.

and it has been pointed out that an information in the nature of *quo warranto* is specially adapted to such cases, and is peculiarly appropriate to try the right to the office, and to give the full measure of redress in case of success.[1]

§ 762. **Inadequacy of the Remedy by Mandamus.** — On principle, it would seem that a *mandamus* cannot be made to take the place of a *quo warranto* as to oust an usurper from a corporate office.[2] According to the practice of the Court of King's Bench, the writ of *mandamus* was never used to vindicate a mere private right; its office was restricted to rights of a public nature. It was therefore denied where it was applied for to restore officers of strictly private corporations who had been ousted from their offices.[3] This restriction upon the use of the writ of *mandamus* has disappeared for the most part in the United States; and it has been held in Massachusetts, upon a learned review of the precedents, that a writ of *mandamus* may be used, where a manufacturing corporation is in fact and theory the petitioner, to compel a board of usurping corporate officers, elected by the casting of illegal votes, to surrender their offices to those having the highest number of votes, after rejecting the illegal votes.[4] This remedy was, however, resorted to in numerous cases, in respect of officers of boroughs and other municipal corporations; and, as hereafter seen, this use of it is strictly analogous to the common use of it in respect of officers of corporations who have been improperly amoved, or in restoring members who have been illegally suspended, expelled or other-

[1] People *v.* Seaman, 5 Denio (N. Y.), 409, 412.

[2] The question was discussed at length in an old case where it was sought by *mandamus* to remove the visitor of a college for not taking the oaths. The *mandamus* was denied, but chiefly upon the ground that the fellows were not parties to the proceeding. Rex *v.* St. John's College, Comb. 279.

[3] "A *mandamus* to restore a surgeon to an hospital was denied, because it is not in the power of the court, nor is it a public office." Anon., Comb. 41. In like manner "a *mandamus* to restore a clerk of the dean and chapter was denied, for he hath nothing to do with the public (his office being only to enter leases granted, etc.), and it don't lie for him any more than for the bailiff of a manor, the same law of a register of a dean and chapter unless there is an affidavit that they have ecclesiastical jurisdiction." Anon., Comb. 133; Rex and Middleton's Case, 1 Keb. 625 and 629.

[4] American Railway Frog Co. *v.* Haven, 101 Mass. 398; *s. c.* 3 Am. Rep. 377.

wise disfranchised. Some courts have denied the remedy by *mandamus* on the ground that the appropriate remedy is by *quo warranto*.[1]

§ 763. Instances of the Use of Mandamus. — Writs of *Mandamus* were constantly granted to compel an officer of a corporation to *swear in* an officer who had been elected to an office in the corporation according to the custom of the corporation or to its charter and by-laws. Thus, it was granted in one case to compel the swearing in of the clerk of a parish.[2] In another case it was admitted that it lay to restore a school-master or parish clerk.[3] It was granted in another case to compel the mayor of Bristol to restore a person to the office of sword-bearer;[4] to restore a fellow of a college who had been expelled from his fellowship;[5] but it was refused in a subsequent case on the ground that the only remedy of the expelled fellow was an appeal to the officers of the corporation.[6] An instance is found in which the writ of *mandamus* was granted to *swear in* a church warden. In one case excuse was pleaded against being compelled to swear in a church warden, "in regard that he should swear him, another being peacefully in, his superior will punish him. But, *per curiam*, they cannot punish for obeying the king's writ."[7] In an old case it is said that "Kelling prayed a *mandamus* to *swear* the party, being elect town clerk of Southampton, which the court granted, they refusing to doe it without money."[8] So, where it appeared that one Audley had a grant of the town clerkship of Bedford in reversion, and the present town clerk had died, and the corporation had granted the town clerkship to one Joy, who was in possession, a writ of restitution was granted Audley by Justice Dodridge;[9] and considerable discussion is had in what seems to be very good law French, of the practice of issuing writs of restitution in such cases. Although, by the principles of the common law of England, a *mandamus* did not lie to induct or restore an officer of an ecclesiastical corporation on the ground that the courts of law had no conusance of such corporations,[10]— yet this principle does not seem to have obtained in America. It has been held that a *mandamus* lies to compel the trustees of a religious corporation to induct a pastor regularly appointed by the proper ecclesiastical authority. The court proceeded upon the ground that where

[1] Aikin *v.* Matterson, 17 Ill. 167; St. Louis County Court *v.* Sparks, 10 Mo. 117.

[2] Anon., Comb. 105.

[3] Parkinson's Case, Comb. 143.

[4] Roe's Case, Comb. 145; *s. c.*, 2 Keb. 799.

[5] Appleford's Case, 1 Mod. 82.

[6] Parkinson's Case, Comb. 143.

[7] Dr. King's Case, 1 Keb. 517.

[8] Rex *v.* Knopton, 2 Keb. 445.

[9] Audley's Case, Latch. 123.

[10] *Post*, § 829.

there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the court ought to assist by a *mandamus*.[1] Moreover, even in cases where the writ of *mandamus* cannot be used to contest the right to the office, it will be granted to compel the doing of that which may be necessary to enable the claimant of an office to make such a contest. Thus, it has been held by one court that a *mandamus* will lie to a board of examiners to compel them to give a *certificate of his election* to a county commissioner, although he may likewise be compelled to resort to a *quo warranto* to remove an incumbent chosen at a new election which the commissioners ordered;[2] and by another court that it will lie to compel a judge to receive the bond, if found to be good, and sufficient, tendered by the claimant of the office of clerk of the court of which the respondent is judge, to the end that the claimant may contest his right to the office in the mode provided by law, without meeting the objection *in limine* that he is not qualified to hold it.[3]

§ 764. No Remedy in Equity except when the Question Arises Collaterally.— A court of *equity* has no authority to determine the validity of the election of the officers of a private corporation, and pronounce judgment of *amotion*.[4] The title of directors, who are in office under color of an election, and who are at most *irregularly chosen*, cannot be inquired into in a suit in equity, instituted to *restrain* them from exercising the functions of their offices, upon the ground of irregularity in their election,— the theory of the courts being that this would be tantamount to inquiring into their title *collaterally*.[5] Again, it has been held that an injunction cannot be granted in an action between individuals to try the right to an office in a *religious corporation*, the remedy being by an action in the nature of *quo warranto*.[6] Nor can a bill in equity be maintained to test the rights of a person claiming to be an officer of a borough, under

[1] People *v.* Steele, 2 Barb. (N. Y.) 397, 416. But see People *v.* Dikeman, 7 How. Pr. (N. Y.) 124.

[2] Strong, Petitioner, 20 Pick. (Mass.) 484.

[3] State *v.* Wear, 37 Mo. App. 325.

[4] *Post*, § 826.

[5] Hughes *v.* Parker, 20 N. H. 58; Mozley *v.* Alston, 11 Jur. 315; 16 Law J. (N. S.) Ch. 217; 1 Phill. Rep. (Ch.) 790; 4 Railw. Cas. (Eng.) 636; *post*, § 788.

[6] Hartt *v.* Harvey, 32 Barb. (N. Y.) 55; *s. c.* 10 Abb. Pr. (N. Y.) 321· 19 How. Pr. (N. Y.) 245.

the appointment of the council, although, as alleged, the appointee has not entered upon or exercised, or attempted to exercise the duties of the office. Here again the theory is that the remedy is at law by a *quo warranto*, to oust the appointee after entering upon the duties of the office, in case it is found to be a usurpation.[1] In like manner, a court of equity will not grant an injunction to restrain the president and directors of a banking corporation from enforcing the payment of a stock subscription, made to commissioners for the organization of the corporation, when their election as directors was affected at most by mere irregularities. To authorize it the court ought to be satisfied that the election was entirely without authority and void.[2] But when the question of the validity of such an election necessarily arises in the determination of a suit properly cognizable by a court of equity, such court will determine it, as it would any other question of law or fact necessary to be decided to settle the rights of the parties.[3] In Georgia, the view has been taken that a bill in equity is the proper remedy in the case of a public incorporated company, where the old board of trustees refused to surrender the control of the corporation to a new board duly constituted, — the court proceeding upon the view that the writ of *quo warranto* tries the right only, but that this legal remedy is inadequate to give relief, and that equity will step in and give relief, where there are grave charges of a *breach of trust*.[4] The decision is entirely out of the current of authority.

§ 765. Statutory Proceedings to Contest Corporate Elections.— A statute of New York[5] authorizes any person who "may be aggrieved by, or may complain of, any *election*" by directors of a corporation, to make application to the Supreme Court to compel a new election. No one but a person *aggrieved* is entitled to be heard under this statute. A notice, given by one as attorney for A. B. *and others*, entitles only A. B. to be heard.[6] A *stockholder* is a person aggrieved within the mean-

[1] Updegraff *v.* Crans, 47 Pa. St. 103.

[2] Hardenburgh *v.* Farmers' &c. Bank, 3 N. J. Eq. 68.

[3] Mechanics' Bank *v.* Burnet Manf. Co., 32 N. J. Eq. 236.

[4] Dart *v.* Houston, 22 Ga. 506.

[5] 1 N. Y. Rev. Stat. 603, § 5.

[6] Matter of Mohawk &c. R. Co., 19 Wend. (N. Y.) 135.

ing of this statute, and the fact that the trustees in question join in the application, forms no objection to granting the relief.[1] This provision of law cannot be invoked by one who was not a *stockholder at the time* of the election complained of, and who received his stock from one of the authors of the wrong complained of.[2] This statute is not restricted to moneyed corporations.[3] Where votes rejected by inspectors at an election of directors, and which, if received, would have elected a certain ticket, are adjudged to have been erroneously rejected, the only remedy is to proceed under this statute to set aside the election.[4] Under the California statute[5] a stockholder may maintain an action to set aside an election of directors, although at the time of the election no stock had stood in his name on the books of the corporation sufficiently long to entitle him to vote.[6] A *State*, when a stockholder in a corporation, may contest an election of directors.[7] A statute of New Jersey[8] makes it the duty of the Supreme Court, upon the application of persons complaining regarding any election, to give a hearing, and "thereupon establish the election so complained of, or to order a new election, or to make such order and give such relief in the premises as right and justice may appear to said Supreme Court to require." It was held, that the statute applied to elections of officers of private corporations, and that the court, having determined who would have been elected if all the legal votes tendered had been received, could put such persons in office and put out intruders.[9]

[1] Matter of Pioneer Paper Co., 36 How. Pr. (N. Y.) 111.

[2] Re Syracuse &c. R. Co., 91 N. Y. 1.

[3] Matter of Cecil, 36 How. Pr. (N. Y.) 477. By a later Statute (Laws N. Y. 1880, p. 381), manufacturing companies exempted from the operations of §§ 5, 6 and 8 of this chapter, and this exempting statute operated retrospectively, and prevented further prosecution of proceedings theretofore commenced under the former statute. Re New York Express Co., 23 Hun (N. Y.), 615. This exempting was however repealed the next year. Laws N. Y. 1881, p. 161.

[4] Matter of Long Island Railroad, 19 Wend. (N. Y.) 37; *s. c.* 32 Am. Dec. 429.

[5] 2 Deer. Cal. Code, § 312.

[6] Wright *v.* Central &c. Water Co., 67 Cal. 532.

[7] State *v.* New Orleans &c. R. Co., 20 La. An. 489.

[8] N. J. Rev. Stat., p. 184, § 44.

[9] Re St. Lawrence Steamboat Co., 44 N. J. L. 529.

§ 766. Information in the Nature of Quo Warranto. — By the ancient common law, the writ of *quo warranto* was the regular remedy resorted to on behalf of the crown to oust an intruder from a public office. In the place of the ancient writ, the more flexible remedy of an information in the nature of a *quo warranto* was substituted, and this remedy is in ordinary use in the United States,[1] with few exceptions.[2] By analogy to the use of this remedy in the case of public offices, it is very generally held that the same remedy exists to oust persons who have usurped or intruded into the offices of either public or private corporations.[3] It lies to restrain the appointment of professors by an incorporated *college* not authorized by its charter to make such appointment.[4] It lies against individuals usurping the office of trustees of an incorporated *church*.[5] It has been held the proper remedy where a *cemetery association* attempted by suit to collect of its *de facto* treasurer money remaining in his hands, which he refused to pay over to a newly elected treasurer on the ground that the election was illegal.[6] It has been held the proper remedy to oust *bank directors* who have come into their offices through the forms of law, and are hence *de facto* officers, if they have been in fact illegally elected.[7] Some holdings restrain the use of this remedy to cases of persons claiming to exercise some *public office or authority*.[8] In England, until after a regular amo-

[1] Respublica *v.* Wray, 3 Dall. (U. S.) 490; Palmer *v.* Woodbury, 14 Cal. 43; People *v.* Scannell, 7 Cal. 432; People *v.* Forquer, 1 Ill. 68; Sudbury *v.* Stearns, 21 Pick. (Mass.) 148; Lindsey *v.* Attorney-General, 33 Miss. 508; Exp. Bellows, 1 Mo. 115; People *v.* Van Slyck, 4 Cow. (N. Y.) 297; Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121; Mayor &c. of New York *v.* Conover, 5 *Id.* 171; Commonwealth *v.* Cullen, 13 Pa. St. 133; Clark *v.* Commonwealth, 29 *Id.* 129; Commonwealth *v.* Fowler, 10 Mass. 290; State *v.* Deliesseline, 1 McCord (S. C.), 52; Akin *v.* Matterson, 17 Ill. 167; St. Louis County Court *v.* Sparks, 10 Mo. 117. Compare State *v.* Wadkins, 1 Rich. (S. C.) 42; State *v.* Evans, 3 Ark. 585.

[2] Terry *v.* Stauffer, 17 La. An. 306.

[3] People *v.* Tibbets 4 Cow. 358; People *v.* Kip, 4 Cow. (N. Y.) 382, note; State *v.* Buchanan, Wright (Ohio), 233; State *v.* Coffee, 59 Mo. 59.

[4] People *v.* Trustees of Geneva College, 5 Wend. (N. Y.) 211.

[5] Commonwealth *v.* Graham, 64 Pa. St. 339.

[6] Hunt *v.* Pleasant Hill Cemetery Association, 27 Kan. 734.

[7] Smith *v.* State Bank, 18 Ind. 327; State *v.* Ashley, 1 Ark. 513; State *v.* Harris, 3 Ark. 570.

[8] Commonwealth *v.* Dearborn, 15 Mass. 125.

tion from office by the corporation, the court will not grant a *quo warranto* to oust an officer.[1]

§ 767. A Civil Proceeding. — An information in the nature of a writ of *quo warranto* to try the right to a corporate office, although partaking of the character of a criminal proceeding in its origin and form, is essentially a civil proceeding.[2] The information, answer and reply, are in Missouri, subject to the rules governing corresponding pleadings in strictly civil cases, — the information answering to the petition in an ordinary civil suit.[3]

§ 768. This Remedy Denied in the Case of Officers who are mere Servants or Employes and Removable at Pleasure. — Although this remedy has, by a seeming aberration in Missouri, been allowed to exist in the case of a contest over the office of secretary of an insurance company,[4] yet the better view is that it does not exist in the case of an officer of a private corporation, who is the mere servant or agent of the company, and holds at the pleasure and will of the directors. The reason is that a judgment against the defendant would be merely nugatory, for the directors might immediately reinstate him.[5] In other words, this right plainly does not exist in the case of a corporate officer whose office is of such a nature that he is removable at the pleasure of the corporation. Where an officer is thus removable, he has no right to a notice of a proceeding to remove him, such as exists in other cases.[6] Although, as hereafter seen,[7] *mandamus* is the ordinary remedy to restore an officer of a corporation where, under the principles of the common law, there is a right in the office in the nature of property or in the nature of a franchise,

[1] Rex *v.* Heaven, 2 Durnf. & E. 772; Rex *v.* Ponsonby, 2 Bro. P. C. 311; Rex *v.* Mayor &c. of Truro, 3 Barn. & Ald. 590.

[2] State *v.* Kupferle, 44 Mo. 154; *s.c.* 100 Am. Dec. 265; State *v.* Lingo, 26 Mo. 496; State *v.* Stewart, 32 Mo. 379; State *v.* Lawrence, 38 Mo. 535.

[3] State *v.* Kupferle, 44 Mo. 154; *s. c.* 100 Am. Dec. 265.

[4] State *v.* Kupferle, 44 Mo. 154; *s. c.* 100 Am. Dec. 265; *ante*, § 767.

[5] People *v.* Hills, 1 Lans. (N. Y.) 202. And see State *v.* Curtis, 35 Conn. 374; *post*, § 805.

[6] Dighton *v.* Stratford-on-Avon, 2 Keb. 641. It has been held in a modern case that stockholders in a joint stock corporation, in which the general public has no interest, may depose the officers of the corporation without notice or trial. Adamantine Brick Co. *v.* Woodward, 4 McArthur (D.C.), 318.

[7] *Post*, § 829.

yet it has been denied to restore an officer who holds his office during pleasure.[1] The power to set aside a corporate election has been denied in New York even in the case of an election of directors of a banking corporation, on the same ground, namely, that such officer may be removed at the pleasure of the associates;[2] but this view does not seem to be in accordance with the current of authority.

§ 769. Any Person Interested may be Relator. — As this is regarded as a *private remedy*, and in the nature of a *civil proceeding*, it naturally follows that any person interested in the election or in the admission of the rightfully elected person into the office, may rightfully file the information.[3] And although a private individual is not permitted, under the law of a particular jurisdiction to prosecute an information in the nature of *quo warranto*, to dissolve a corporation, yet he may be permitted to prosecute such an information in the case of an intrusion into a a corporate office.[4] The remedy is allowed on the relation of a private individual against one illegally holding an office in a *municipal corporation;*[5] and in many States it is the ordinary remedy of one claimant of a public office against the occupant of such an office.[6] It was observed by Mr. Justice Strong that "doubtless, in England, when the information is against a burgess or alderman of a borough, a corporator is held a fit relator. He has an interest.[7]" By analogy, any member of a corporation would ordinarily be a competent relator to dispute the right of any person to hold an office in the corporation.

§ 770. Information Filed by the Attorney-General or Prosecuting Attorney. — The existence of the remedy at the relation of a private person, who is interested in the determination of the right to the office, does not, of course, in the case of a *public office*, divest the State of its remedy by an information

[1] Dighton *v.* Stratford-on-Avon, 2 Keb. 641.

[2] Matter of Bank of Dansville, 6 Hill (N. Y.), 370.

[3] Commonwealth *v.* Union Ins. Co. Newburyport, 5 Mass. 230; Commonwealth *v.* Fowler, 10 *Id.* 290.

[4] State *v.* Paterson &c. Co., 21 N. J. L. 9.

[5] Commonwealth *v.* Jones, 12 Pa. St. 365.

[6] State *v.* Orvis, 20 Wis. 235.

[7] Com. *v.* Cluley, 56 Pa. St. 270; *s. c.* 34 Am. Dec. 75, 79.

filed by its attorney-general, or other proper law officer, to oust an intruder into an office held under the State.[1] Under a statute, it is held in New York that the attorney-general is authorized to bring such an information in the name of the public. Such action must be commenced and prosecuted like other civil actions, and is governed, in respect to the pleadings and proceedings, by the same rules.[2] Such an action is one of *legal*, not of *equitable* cognizance, and the issues therein are strictly legal ones.[3]

§ 771. **What the Information must Allege.**— Where the action is brought by the State against one for usurping a public office, the same certainly is required in the information as in an *indictment*. In such a case, it is not sufficient to charge that the defendant was "unlawfully executing the duties and exercising the powers" of the office described, without alleging the usurpation or specifying *wherein* such usurpation was unlawful.[4] When the court is not judicially informed concerning the nature of an alleged office in a corporation, it must be so described, as to its nature and duties, as to show whether it is an office within the purview of the law relative to the usurpation of franchises.[5] Thus, where such an information charged the defendants with intruding

[1] Commonwealth *v.* Fowler, 10 Mass. 295; Parker *v.* Smith, 3 Minn. 240.

[2] People *v.* Albany &c. R. Co., 1 Lans. (N. Y.) 308; 55 Barb. (N. Y.) 344; 38 How. Pr. (N. Y.) 228; 7 Abb. Pr. (N. Y.) (N. S.) 265.

[3] People *v.* Albany &c. R. Co., 57 N. Y. 161. This decision affirmed the judgment of the general term of the Supreme Court but overruled the reasoning, to the effect that in such an action, the relief demanded consists in, and the nature of the case requires, the exercise of the equitable powers of the court; and an injunction may be issued, and a receiver be appointed, as the usual and appropriate instrumentalities of a court of equity. People *v.* Albany &c. R. Co., 1 Lans. (N. Y.) 308; 55 Barb. (N. Y.) 344; 38 How. Pr. (N. Y.) 228; 7 Abb. Pr. (N. Y.) (N. S.) 265; 5 Lans (N. Y.) 25. It also overruled the reasoning of the same court to the effect that the attorney-general is authorized by the statute to bring, in the name of the people, and upon his own information, an action against several persons, consisting of two distinct classes, each claiming, by virtue of separate elections, to be the board of directors of a corporation, for the purpose of trying their respective rights to such office, and ascertaining whether either of such elections was regular and legal, and if so, which of them; and if neither of such boards shall be declared duly elected, then that both classes of defendants be removed from office, and a new election ordered. *Ibid.*

[4] Lavalle *v.* People, 68 Ill. 252.

[5] People *v.* DeMill, 15 Mich. 164.

into the offices of wardens and vestrymen of a certain church, which was alleged to be a corporation created by the authority of the State, it was held that, inasmuch as the court had no judicial knowledge of the existence of any such corporation, the information was defective in not setting forth such facts as, in connection with the public statutes, of which judicial notice can be taken, would show such corporate existence.[1]

772. The Plea. — Where the remedy is used as at common law, the plea must allege specifically the facts which go to show the right of the respondent to hold the office. For instance, if the office is that of a director of a banking corporation, it must allege an election under which the respondent was chosen director, and that this election was held in pursuance of the governing statute or valid by-laws or regulations.[2] Where this conception of the remedy prevails, if the respondent suffers judgment to go against him by default, the court will go no farther than to give judgment of ouster: it will not determine the relator's right to the office.[3] But where the remedy exists in its enlarged form, as it does in many American jurisdictions, so that it is regarded rather as a civil remedy to determine a contest for the right to hold a corporate office, the relator must not only show that the respondent has entered into the office without lawful warrant, but he must also show title to the office in himself.[4] Where the averments of an information in the nature of a *quo warranto* set out a continued usurpation of an office, by a loss of the qualifications necessary to the holding of it, the plea of the officer must set out expressly the continuance of every qualification down to the filing of the information, and it is not sufficient to state that the incumbent *was* qualified at the time of his appointment, and to

[1] People *v.* DeMill, 15 Mich. 164. But an information to oust an officer of a private corporation, alleging that he was elected at an illegal meeting, and deceived the relators as to the time of such meeting, need not *allege* that the relator would have voted against him if present. Armington *v.* State, 95 Ind. 421.

[2] Speaking with reference to a particular case, it has been held that the plea must show that an election was held at which the respondent was chosen director, that it was held in pursuance of an ordinance or direction of the board of directors, fixing the time when the place where it should be held, agreeably to the requirements of the charter. State *v.* Ashley, 1 Ark. 513, 552.

[3] People *v.* Connor, 13 Mich. 238.

[4] Miller *v.* English, 21 N. J. L. 317.

rely on the presumption of the continuance of the qualifications until the loss of them is shown.[1] In *quo warranto*[2] for usurping the office of president of an incorporated bank, where the ownership of real estate is, by law, a qualification for the office, the party holding the office must, in his plea of *justification, describe the real estate* of which he is the owner and state how he has derived title thereto, and exhibit the deeds and records by which his ownership is evidenced. And where the ownership of stock is a qualification for the office, such ownership must be pleaded in such a manner as to show that the stock was originally awarded to the respondent after a compliance with the requirements of the law; or if acquired by transfer, a transfer must be set out. And moreover, in pleading his election by the stockholders, he must show that the election was held agreeably to law and in conformity with and in pursuance of the ordinances and regulations of the governing board of the corporation; and that, at such an election he received a majority of the legal votes cast. Or if his claim is by virtue of an election by the board of directors, to supply a vacancy therein, he must show the existence of a board competent to elect, and that a vacancy existed therein, and how such vacancy arose, and his subsequent election. The defendant need not, however, in his defensive pleading, state that the electors, by whom he was elected, were possessed of the proper *qualification*, for that is matter which must be pleaded in avoidance by the State.[3]

§ 773. **Misjoinder of Parties.** — No mode of election or appointment can authorize persons claiming different offices to unite their complaints and determine their title to both offices in one proceeding, without a statute specially permitting such a practice. Therefore, where persons claiming to be wardens and vestrymen of a church, united as relators in the same *quo warranto* proceeding, to test thereby their rights to the respective offices against adverse parties, it was held, that the information

[1] State *v.* Beecher, 15 Ohio, 723.

[2] Not an information in the nature of a *quo warranto*.

[3] State *v.* Harris, 3 Ark. 570; *s. c.* 36 Am. Dec. 460. That the *replication* may impeach a necessary qualification in the defendant to an office set forth of the plea as possessed by him, — see Rex *v.* Brown, 4 Durnf. & E. 276; Rex *v.* Hill, 4 B. & C. 443. Instance of a *plea* bad for *duplicity:* Commonwealth *v.* Gill, 3 Whart. (Pa.) 228.

was bad for misjoinder.[1] Nor will the court *consolidate* several informations in the nature of *quo warranto* against several persons for distinct offices; there must be an information against each to disclaim.[2]

§ **774. Leave to File Discretionary with Court.** — Where the information is brought to oust a person alleged to be usurping an office under a private corporation, it is in the discretion of the court to allow or not to allow it to be filed.[3]

§ **775. When the Relator Bound to Show Title.** — As hereafter more fully pointed out,[4] the primary office of this remedy at common law was to compel the subject to exhibit to the sovereign the authority by which he assumed to exercise an office or franchise under that sovereign. Where this conception of the remedy prevails, it is limited merely to an inquiry into the right of the respondent to hold the office, and the court does not go so far as to inquire whether the relator is entitled to hold it or not. Where the remedy is used as it existed at common law, the State is not bound to show anything; for if the office was lawfully granted, the defendant can show his warrant for exercising its duties. He must disclaim or justify. If he disclaims, the State has judgment. If he justifies, he must show his title specially, and all the particulars on which it is founded. When, therefore, a writ of *quo warranto*,[5] was directed against the defendant as director of a banking corporation, it was held that his plea must

[1] People *v.* DeMill, 15 Mich. 164.

[2] Rex *v.* Warlon, 2 Maule & S. 75. In a *quo warranto* against three to show why they held the office of bank directors, one disclaimed, the rest pleaded to issue. Held, that this was not a case under the act of April 13, 1840, § 13, authorizing a decree in favor of the relators, in case judgment of ouster was given. Commonwealth *v.* Sparks, 6 Whart. (Pa.) 416.

[3] Gunton *v.* Ingle, 4 Cranch C. Ct. (U. S.) 438; People *v.* Tibbets, 4 Cow. (N. Y.) 358; People *v.* Kipp, *Id.* 382; Commonwealth *v.* Arrison, 15 Serg. & R. (Pa.) 127; *s. c.* 16 Am. Dec. 531. In Missouri, an information in the nature of a *quo warranto* in the name of the circuit attorney, at the relation of a private individual, seeking the determination of a matter of right between two private persons can be filed *in the Supreme Court* only on leave especially granted for that purpose; and leave will not be granted except on an agreed case on the facts, or in an extraordinary case. State *v.* Lawrence, 38 Mo. 535.

[4] *Post*, § Ch. 157.

[5] Not an information in the nature of *quo warranto*.

allege that he was a stockholder; that the election, under which he claimed to have been chosen, was held under and in pursuance of an ordinance of direction of the board of directors, fixing the time and place where the same should be held, agreeably to the provisions and requirements of the charter.[1] And even in England, on a motion for an information in the nature of a *quo warranto* against a corporator, to vacate his office on the ground of his acceptance of a second and incompatible office, the relator must show a legal appointment to the second office.[2]

§ 776. Distinctions as to the Burden of Proof. — This calls up an important distinction also exist as to the burden of proof, growing out of the theories upon which the remedy is used. Where the remedy is pursued according to the theory of the common law, the burden is upon the defendant. That theory, as already suggested, is that the sovereign has a right to know by what authority the subject assumes to discharge the duties of a public office or to exercise a particular franchise. The sovereign, therefore, need not show that the respondent is without authority, but he is obliged, in answer to the demand of the sovereign to show that he has authority.[3] But where the conception of the remedy is that it is a mere contest between private litigants for the possession of a corporate office,[4] the burden of proof is upon the moving party, that is to say upon the relator. The reason is that, in such a case, the respondent, in possession of the office and exercising its functions *de facto*, is presumed to be regularly and lawfully there until the contrary appears, and it is for the relator to overcome this presumption by evidence.[5] The burden of proof is none the less on the relator because the form of the issue requires the defendant to show cause.[6] The reason of the rule is that the ordinary presumption of right-acting applies to the acts of corporations, as well as to those of individuals.[7] "The defendants," says the

[1] State *v.* Ashley, 1 Ark. 513, 552. And see People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358.

[2] Rex *v.* Day, 9 Barn. & C. 702; *s. c.* 4 Mann. & R. 541.

[3] *Post*, § Ch. 157.

[4] *Ante*, § 767.

[5] State *v.* Kupferle, 44 Mo. 154; *s. c.* 100 Am. Dec. 265.

[6] State *v.* Hunton, 28 Vt. 594.

[7] State *v.* Kupferle, 44 Mo. 154; McDaniels *v.* Flower &c. Co., 22 Vt. 274.

Supreme Court of Vermont, "are in possession of the office in question, and should be presumed rightly elected, and entitled to hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they shall go forward in the proof and in the argument."[1] "This," says the Supreme Court of Missouri, "puts the matter on clear and reasonable ground, and there is nothing in our statute to require a different and less reasonable practice."[2] This is especially so, where the incumbent of the office, against whom the proceeding is instituted, holds a *certificate* of election or appointment, for this is in the nature of a muniment of title. It has been well observed, with reference to disputes for the possession of corporate offices, that where there has been an authorized election for the office in controversy, the *certificate* of election which is sanctioned by law or usage, is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law.[3]

§ 777. **The Rule in New York.** — In an action in the nature of a *quo warranto*, under the New York code of procedure, to test the right of the respondent to hold an office into which he has been inducted, and to establish the right of the relator to such office, the burden is upon the respondent to show, by affirmative evidence, that his possession of the office is rightful and legal; but, as a failure on his part to sustain this burden would not establish the right of the relator,

[1] State ex rel. *v.* Hunton, 28 Vt. 594. To the same effect, see People *v.* La Coste, 37 N. Y. 192; State *v.* Brown, 34 Miss. 688.

[2] State *v.* Kupferle, *supra.* Speaking with reference to the particular case, it was further said by Currier, J.: "The proceedings of the board of *de facto* directors are to be presumed regular until irregularity is shown. They are not to be presumed irregular. The 22d by-law, set out in the information, provides that officers, except the president and vice-president, shall hold their offices until removed by the majority of the board of directors on a charge of disability, violation of duty, or any other sufficient cause. Under this rule the secretary was removable when the directors should consider there was sufficient cause for it, and they were the judge of the sufficiency of the cause. No formal notice of charges or trial was requisite. A majority of the *de facto* board of directors considered that a sufficient cause of removal had arisen, and accordingly removed the secretary, as the information shows, and put another man in his place. Until their action is impeached by proof, it is to be presumed that they acted on sufficient grounds." *Ibid.*, 44 Mo., at p. 159; 100 Am. Dec., at p. 267.

[3] Kerr *v.* Trego, 47 Pa. St. 292.

upon the issue of the relator's right, the burden is on him. The subject was thus discussed in an important case in the New York Court of Appeals, by Andrews, J.: "The ancient writ of *quo warranto* was a writ of right for the king, against one who usurps any office, franchise or liberty, to inquire by what authority he supports his claim, in order to determine the right.[1] In theory the king was the fountain of honor, of office and of privilege. And, whenever a subject undertook to exercise a public office of franchise, he was, when called upon by the crown, through the writ of *quo warranto*, compelled to show his title, and, if he failed to so, judgment passed against him. The foundation of the rule may have been that, as all offices and franchishes are the gift of the king, they were deemed to be possessed by him, and, until his grant was shown, there could be no presumption that he had parted with them, or invested a subject with the right to exercise, by delegation, any part of the royal prerogative. But whatever may have been the origin of the rule, it was well established, and was applied also in cases where proceedings by information, in the nature of a *quo warranto*, were resorted to as a substitute for the writ.[2] In this State, the rule that, in proceedings by information to try the title to an office, the burden is upon the defendant to show his right, and that, failing to do it, judgment must go against him, has been frequently recognized.[3] The writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* have been abolished,[4] and a remedy by action is given. The action may be brought by the attorney-general, in the name of the people, upon his own information, or upon the complaint of any private party, against a person who shall usurp, intrude into or unlawfully hold or exercise any public office; and the provision of the Revised Statutes [5] which extendsthe scope of the original proceeding by *quo warranto*, and which allowed the attorney-general to set forth in his information the name of the person rightfully entitled to the office in controversy, with an averment of his right thereto, and authorized judgment to be rendered upon such right, as well as upon that of the defendant, has been preserved.[6] The forms of procedure have been changed, but the position of the defendant, and the rules of evidence, and the presumptions of law and fact are the same as in the proceeding by writ or information, for which the remedy by action was substi-

[1] Citing 3 Bla. Com. 262.

[2] Citing Rex *v.* Leigh, 4 Burr. 2143.

[3] Citing People *v.* Utica Insurance Co., 15 Johns. (N. Y.) 358; People *v.* Thompson, 21 Wend. (N. Y.) 252; *s. c.* 23 *Id.*, 567, 589; People *v.* Pease, 27 N. Y. 63; Kyd Corp. 399; Cole Quo War. 221.

[4] Citing N. Y. Code Civ. Proc., § 428.

[5] Citing 2 R. S. N. Y. 582, § 35.

[6] Citing N. Y. Code Civ. Pro., §§ 435, 436.

tuted. The people are here the ultimate source of the right to hold a public office; and now, as heretofore, when the right of a person exercising an office is challenged in a direct proceeding by the attorney-general, the defendant must establish his title, or judgment will be rendered against him. It results from these considerations that the defendant, in order to have judgment in his favor, was required to prove that he was elected to the office of mayor at the election held in April, 1872. The possession of the office was not, in this action, evidence of his right. The burden was upon him to show, by affirmative evidence that his possession was a legal and rightful one. But a failure on his part to prove his title to the office would not establish that of the relator. Upon the issue of the relator's title the plaintiffs held the affirmative, and the *onus probandi* was upon them to maintain it. Judgment in the action might have been rendered against the defendant, without adjudging that the title to the office was in the relator.[1]

§ 778. Remedy Exists only against a Party in Possession. — The remedy is analogous to an action in ejectment for the recovery of land, in this respect, that it is exercised only against a party in actual possession; and, as already seen,[2] he may disclaim title, just as a defendant may do in ejectment. It is, therefore, a part of the case of the State or of the relator that the defendant, against whom the writ is directed, is or has been in the actual possession of the office. It is not sufficient that he has been merely elected to it and has tendered himself to be sworn in.[3]

§ 779. Matters of Evidence. — Recurring to the proposition that the plaintiff must prove, as a part of his case, that the defendant was in actual possession at the time of the commencement of the action, it may be stated that proof of *user* of the office may be made by any witness who has knowledge of the fact.[4] Where it is material to prove who were elected directors at an election, this, it seems, may be proved by *parol evidence*, unless there is a statute requiring a higher grade of evidence, — as where there is a statute requiring a record to be kept, and a record is in fact kept. Accordingly, it has been held competent to prove who were elected directors of a company, by the testi-

[1] People ex rel. *v.* Thatcher, 55 N. Y. 525; *s. c.* 14 Am. Rep. 312.

[2] *Ante*, § 775.

[3] Rex *v.* Whitwell, 5 Durnf. & E. 85.

[4] Facey *v.* Fuller, 13 Mich. 527.

mony of witnesses who were present at the election.[1] So, it has been held that, even where a corporation is required by law to keep a record of its acts, it may lawfully act without doing so, and *parol evidence* of its acts will be admissible.[2] But where such a record is kept, parol evidence cannot be admitted to vary, control or explain a vote of the corporation as there recorded, when the language of the vote as recorded contains no imperfection or ambiguity.[3] So, the "warnings" and proceedings of meetings of a corporation having a clerk, and whose by-laws require the warnings to be in writing, cannot be proved by parol.[4] It has been held that, on a trial of a *quo warranto* information against the wardens and vestrymen of a religious society, in which the legality of the election is in issue, evidence may be received of *conversations* and transactions previous to the election, if they were connected with and might have an influence on, the election, although no previous notice thereof has been given.[5]

§ 780. **Remedy does not Extend to Mere Irregularities, Mistakes, etc.**— The court will not allow an information in the nature of a *quo warranto* to try the title to an office to be filed, merely because there has been an *irregularity* in the election, in the absence of *bad faith*, and where the result of the election has not been affected.[6] In a case of merely holding an election for city officers on a wrong day, by a general mistake, and without any corrupt motive, the court, in the exercise of its discretion, may well refuse a *quo warranto* to oust an elected officer.[7] This is tantamount to saying that a court will not set aside a corporate election without substantial grounds founded upon proper and sufficient evidence.[8] Mere irregularity in the

[1] Partridge *v.* Badger, 25 Barb. (N. Y.) 146.

[2] Old Town *v.* Dooley, 81 Ill. 255. The official character of persons who acted as defendant's officers may be proved by *parol*, without producing the records of the corporation, see Pusey *v.* New Jersey &c. R. Co., 14 Abb. Pr. (N. S.) (N. Y.) 434.

[3] Peterborough R. Co. *v.* Wood, 61 N. H. 418.

[4] Stevens *v.* Eden &c. Society, 12 Vt. 688.

[5] Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29; *s. c.* 8 Am. Dec. 628.

[6] Queen *v.* Ward, L. R. 8 Q. B. 210.

[7] State *v.* Tolan, 33 N. J. L. 195.

[8] Conant *v.* Millaudon, 5 La. An. 542.

election, or the fact that the *expenses* of the commissioners were not paid, will not, it has been held, authorize the court to set such an election aside; nor will an *injunction* to prevent the installment of the officers be granted, unless it appear that the election was entirely without authority of law and void.[1]

§ **781. Rule of Decision in Cases where Legal Votes have been Rejected or Illegal Votes Received.**— Persons receiving no more than a *minority* of the votes cast for directors cannot, in this proceeding, even where it is enlarged to the scope of a civil action to contest an election, be declared elected, although it is made to appear that the judges improperly rejected enough legal votes offered to give them a majority.[2] It is no objection that *illegal votes* were received, unless such votes were sufficient in number to change the result; the mere fact that illegal votes were cast will not avoid such an election.[3] But where the persons for whom the votes wrongfully rejected were tendered, would, with such votes, have had the votes of a *majority* of all the shares, the court will set aside the election, and order the admission of those persons who would have been elected if such votes had been received.[4] It has been reasoned that the mere assertion, in such case, that the votes may be illegal, is not sufficient to put the officers elected on proof of their legality. The hypothesis presented assumes a fraud upon the charter; and fraud is not to be presumed.[5] The court also reasoned that one who contests an election on the ground that votes given by an elector acting as trustee were for the benefit of other stockholders who had already voted up to the limit allowed by the charter, must show it affirmatively. The bare possibility that the votes were held for such persons, is not to be regarded. The contingency is too remote to deserve notice as a

[1] Hardenburgh *v.* Farmers &c. Bank, 3 N. J. Eq. 68.

[2] State *v.* McDaniel, 22 Ohio St. 354. Downing *v.* Potts, 23 N. J. L. 66; Re St. Lawrence &c. Co., 44 N. J. L. 529. Re Long Island R. Co., 19 Wend. (N. Y.) 37.

[3] Sudbury *v.* Stearns, 21 Pick. (Mass.) 148; Ex parte Murphy, 7 Cow. (N. Y.) 153. Downing *v.* Potts, 23 N. J. L. 66.

[4] Re Cape May &c. Co., 51 N. J. L. 78; *s. c.* 16 Atl. Rep. 191; Re St. Lawrence &c. Co., 44 N. J. L. 529, 536. But see Re Long Island R. Co., 19 Wend. (N. Y.) 37, 45.

[5] Conant *v.* Millaudon, 5 La. An. 542.

legal presumption.[1] Where it is sought to overthrow such an election on the ground that the stock has been unlawfully increased and that additional shares have been unlawfully voted, the effort will fail if it appear that the directors received, not only a majority of the stock as increased, but also a majority of the stock as it stood prior to the increase.[2] The governing principle is that the election will not be held invalid, if those entitled to vote have had a full and fair opportunity of expressing their choice, and if the officers chosen are the choice of a majority of the persons voting.[3]

§ 782. **Where Two Factions Organize Two Meetings.**—If at the meeting for an election, there are two factions and each assumes to organize the meeting, and rival chairmen are elected, the first regular and formal proceeding for organization will be recognized by the law as valid. The redress of any persons aggrieved by such organization is to be sought through the courts, not by disorder in attempting to carry on two elections at once; and those who participate in such a course, refusing to vote in the regular election, cannot have the election set aside on the ground that it was made by a minority.[4]

§ 783. **Party Receiving the next Highest Number of Votes, where Successful Candidate Disqualified.**—Applying a principle already stated,[5] it has been held that the relator in a *quo warranto* proceeding has *no interest*, which will enable him to make a contest, where he is merely the next in vote at an election for public office, although the person receiving the highest number of votes and returned elected, is *disqualified*. The relator, in such a case, has no more interest than any other inhabitant of the commonwealth. The question of his right to the office is a public one exclusively, and can only be raised by the attorney-general. The

[1] *Ibid.*

[2] Byers *v.* Rollins (Colo.), 21 Pac. Rep. 894. The word *elect* in a statute is sometimes equivalent to the word *appoint*, and where the statute authorized a city corporation to elect certain officers, without prescribing the mode of election, it was held that an appointment by resolution was a good exercise of the power. Low *v.* Commissioners, R. M. Charlt. (Ga.) 302.

[3] Philips *v.* Wickham, 1 Paige (N. Y.), 590.

[4] Matter of Pioneer Paper Co., 36 How. Pr. (N. Y.) 111; *ante*, § 720.

[5] *Ante*, § 752. Compare *post*, § 3869.

reason is that the fact that the majority candidate is disqualified does not elect the minority candidate.[1] But a minority candidate may acquire a sufficient title or interest, at a *subsequent election*, to enable him to dispute the title of the opposing candidate in this way.[2]

§ 784. Validity of Election where Whole Number not Elected.—It seems that an election of directors of a corporation is not invalid, from the mere fact the whole number prescribed by the governing statute are not elected, if enough are elected to constitute such a *quorum* as the governing statute requires. Thus, where the number prescribed by the governing statute was *twenty-three*, a majority of whom were competent to act, an election of *twenty-two* only was held valid.[3] Where an act, authorizing the election of trustees, is silent in regard to the number to be chosen, and ten were elected, six of whom, being a majority, are recognized by the legislature as a competent board, the organization is sufficient.[4] So, where a *reduction* of the number has been authorized by an amendatory statute, it is no objection that the reduced number have been elected before any formal action of the corporation has been taken reducing the number; since, at most, the failure to elect the others leaves a vacancy, which may be filled in accordance with the provision of the charter.[5]

§ 785. Judgment where Term of Office has Expired.—Where, in a proceeding in the nature of a *quo warranto*, the cause is not finally determined until the term of the office contested is expired, the court cannot, of course, render a judgment of ouster; but if it is found that the relator was entitled to the office, a *general judgment* will be entered in his favor and for

1 Com. *v.* Cluley, 56 Pa. St. 270; *s. c.* 94 Am. Dec. 75. See also Cole on Quo Warranto, 141, 142; Reg. *v.* Hiorns, 7 Ad. & El. 960; *s. c.* 3 Nev. & P. 148; Rex *v.* Bridge, 1 Maule & S. 76. Compare Rex *v.* Hawkins, 10 East, 211; Rex *v.* Parry, 14 East, 549. And see Com. *v.* Cluley, 56 Pa. St. 270; *s. c.* 94 Am. Dec. 75, where the forego ng cases are compared and distinguished.

2 Com. *v.* Small, 26 Pa. St. 31.

3 Matter of Union Ins. Co., 22 Wend. (N. Y.) 591. See Wright *v.* Commonwealth, 109 Pa. St. 560.

4 Dart *v.* Houston, 22 Ga. 506.

5 Re Excelsior Ins. Co., 38 Barb. (N. 297. Y). Power of directors to fill vacancies under early Virginia banking law: Bank of Virginia *v.* Robinson, 5 Gratt. (Va.) 174.

costs.[1] On the same principle, the court may, in its discretion, refuse to allow the attorney-general to file an information in the nature of a *quo warranto* against an officer, when it appears that the time for which he was elected will expire before the inquiry can have any effect, but will leave the party to any other remedy which he may have.[2] In a subsequent case in the same court, this view was somewhat modified, the court holding that it would not deny leave to file an information in the nature of a *quo warranto* against persons who had unlawfully intruded into corporate offices, on the ground that the offices were merely annual, and that it was therefore doubtful whether, according to the course of the court, a trial could be had before the term of office would expire: provided the application for leave to file the information had been made at the earliest opportunity after the offense complained of was committed. In so holding, Savage, C. J., said: "Here the motion was brought before us at the term next after the election. We cannot refuse it upon the mere chance that a trial may fail. To do this would be equivalent to a refusal in all cases where the office is annual — a length to which I presume the court did not intend to go, and to which it was not necessary to go in People *v.* Sweeting.[3] On the whole we are clear, upon the nature of the case, as to our right of allowing the information to be filed; and that the lapse of time is not such as to require us, in the exercise of a sound discretion, to deny it."[4] If an election for managers of a corporation be not disputed during their term of office by *quo warranto*, and they are permitted to act throughout their term as managers *de facto*, the *legality of the next election* cannot be questioned for any vice or irregularity in the first.[5]

§ 786. Proceeding against an Incumbent who is Disqualified. — It seems that the remedy extends to ousting an incumbent who does not possess the legal *qualifications* for the office,

[1] People *v.* Loomis, 8 Wend. (N. Y.) 396; *s. c.* 24 Am. Dec. 33; People *v.* Seaman, 5 Denio (N. Y.), 409, 414.

[2] People *v.* Sweeting, 2 Johns. (N. Y.) 184. See also Morris *v.* Underwood, 19 Ga. 559; State *v.* Jacobs, 17 Ohio, 143.

[3] 2 Johns. 184.

[4] People *v.* Tibbets, 4 Cow. (N. Y.) 358, 381.

[5] Com. *v.* Smith, 45 Pa. St. 59.

and is not restricted to inquiring into the regularity of the election or other proceedings by which he has obtained the office.[1]

§ 787. **Estoppel to Raise Objection.** — A corporator who, with a full knowledge of the objections to the legality of a certain class of votes, attends a meeting of the corporation, participates in its deliberations, and acquiesces in its decisions, by canvassing and voting in the election of officers, cannot question the title of the officers elected, on the ground that such class of votes was illegal.[2] In short, where the wrong complained of is the result of his own misconduct or neglect, or he has acquiesced or concurred in it, he will not be listened to. Accordingly, where a member of a corporation, having knowledge of defects in the preliminaries of organization of the corporation, took part in an election for directors, and the officers so elected acted and contracted as such, it was held, that having held the corporation out to the world as being properly organized, he could not file an information in the nature of *quo warranto* against such directors.[3] But where he concurs in an election *in ignorance* of some fact making it invalid, and afterwards shows the objection, and that it has come to his knowledge since the election, he should be heard; for consent, induced by error, is not binding in the eye of the law.[4] In like manner it has been held no objection to an application for a *quo warranto* to oust the defendant from the office of alderman, by a corporator who objected to his qualification at the time of his election, that he *afterwards made no objection* to his election to the principal office of magistracy (which required the defendant to be an alderman as a qualification), and attended at and concurred in corporate meetings where the defendant presided or attended in his official capacity.[5]

§ 788. **Title to Corporate Office not Impeached Collaterally.** — The principle, elsewhere discussed,[6] which upholds the existence of *corporations* against collateral attack, applies equally to the *officers* of a corporation, when their right to act as such

[1] State *v.* Gastinell, 20 La. An. 114; *s. c.* 18 *Id.* 517; *post*, § 790.

[2] State *v.* Lehre, 7 Rich. Law (S. C.), 234.

[3] Cole *v.* Dyer, 29 Ga. 434.

[4] Wiltz *v.* Peters, 4 La. An. 339.

[5] Rex *v.* Clark, 1 East, 38.

[6] *Ante*, § 501; *post*, Ch. 184.

is questioned in collateral proceedings. The principle is strictly analogous to that which validates the acts of *de facto* public officers in respect of third persons. It is, that persons *acting publicly* as the officers of a corporation are presumed to be rightfully in the possession of their offices, and that their acts are binding on the corporation, so far as is necessary to uphold the rights of third persons.[1] The particular officer may be *ineligible;*[2] he may have been elected by a *less number of votes* than the charter requires;[3] he may be in office under a *judicial decision* subsequently *reversed;*[4] or he may have been otherwise elected *irregularly* or *illegally*,[5] and yet the irregularity or illegality of his election cannot be set up even as against the corporation, to defeat the validity of his acts, provided he is in under *color* of right. Conflicting claims to a corporate office cannot be deter-

[1] Hall *v.* Carey, 5 Ga. 239; Susquehanna Bridge &c. Co. *v.* General Ins. Co., 3 Md. 305; State *v.* Williams, 27 Vt. 755. And see Lemington *v.* Blodgett, 37 Vt. 210; Durkin *v.* Exchange Bank of Virginia, 2 Patt. & H. 277; St. Luke's Church *v.* Matthews, 4 Desauss. (S. C.) 578; Riddle *v.* County of Bedford, 7 Serg. & R. (Pa.) 392; York County *v.* Small, 9 Watts & S. (Pa.) 320; Kingsbury *v.* Ledyard, 2 *Id.* 41; McGargell *v.* Hazleton Coal Co., 4 *Id.* 425; Despatch Line of Packets *v.* Bellamy Manuf. Co., 12 N. H. 205; Smith *v.* Erb, 4 Gill (Md.), 437; Burr *v.* McDonald, 3 Gratt. (Va.) 215; Matter of Mohawk &c. R. Co., 19 Wend. (N. Y.) 135; Lovett *v.* German Reformed Church, 12 Barb. (N. Y.) 67. And see Merrill *v.* Farris, 22 Ill. 303; Schofield *v.* Watkins, 22 Ill. 66; Facey *v.* Fuller, 13 Mich. 527. By *statute* in Indiana, no act of any board of directors done, shall be invalid by reason of any informality or irregularity in time, place, and manner of their election. 2 Rev. Stat. Ind. 1888, § 3021. Definition of officer *de facto:* Rex *v.* Corporation of Bedford Level, 6 East, 356.

[2] Knight *v.* Wells, Lutw. 508.

[3] Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411.

[4] Ebaugh *v.* German Reformed Church, 3 E. D. Smith (N. Y.), 60. A person who makes a contract with church trustees who are in possession of all the church property, without his having knowledge of any illegality in their election, may enforce his claim on the contract, though the election should afterward be adjudged illegal. And the fact that he was himself one of the trustees *de facto* does not alter the case, in the absence of bad faith. So held, where the courts had decided that the trustees were legally in office, and the adverse claimants had submitted to this decision, and had given no notice of any intent at that time to continue the litigation. Ebaugh *v.* German Reformed Church, 3 E. D. Smith (N. Y.), 60.

[5] Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411. See also Blandford *v.* School District, 2 Cush. (Mass.) 39; Delaware &c. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131; Sampson *v.* Bowdoinham Steam Mill Corp., 36 Me. 78; Penobscot &c. R. Co. *v.* Dunn, 39 Me. 587; Smith *v.* Bank, 18 Ind. 327.

mined in an action of *ejectment*, brought in the name of the corporation by persons claiming to be its *legal trustees;* [1] nor in an action of *replevin* for personalty of the corporation; [2] nor by *habeas corpus* granted to a party who has been arrested on a warrant issued by such officer; [3] nor upon a motion to vacate judicial proceedings as irregular, where summons was served on persons claiming to be corporate officers, who were not in possession of the offices, — though the court would vacate the proceedings, because they were not officers *de facto.*[4] But, of course, the rule does not extend so far as to validate, even in respect of third persons, the acts of naked trespassers or intruders.[5] Thus, it has been held that, where an action has been commenced in the name of a corporation, by direction of its officers *de facto*, no other persons claiming a right to act as the officers of the corporation, the defendant cannot be permitted to show, for the purpose of defeating the action, that the officers were illegally elected.[6] It is a necessary consequence of this doctrine, that the appointment and powers of corporate officers may be inferred from the continued *acquiescence* of the corporation in their official acts, — for instance, in the case of an insurance company, the *recognition* by the company of the fact that a certain person has openly and notoriously transacted its business as its secretary, has had the custody of its books, and has borrowed money and entered accounts of it therein.[7] On the other hand, the neglect to be sworn into an office for a great length of time, *e.g.*, above twenty years after the party is

[1] Parish of Bellport *v.* Tooker, 29 Barb. (N. Y.) 256.

[2] Desmond *v.* McCarthy, 17 Iowa, 525.

[3] Exp. Strahl, 16 Iowa, 369.

[4] Berrian *v.* Methodist Society in New York, 4 Abb. Pr. (N. Y.) 424.

[5] A *bare swearing-in* and acting does not make an officer *de facto;* there must be, at least, the *form* of an election, though the election may be subsequently set aside. Rex *v.* Lisle, 2 Strange, 1090.

[6] Charitable Association *v.* Baldwin, 1 Metc. (Mass.) 359.

[7] Talladega Ins. Co. *v.* Peacock, 67 Ala. 253. The act of the proper officer, in making an appointment to an office has been said to be in the nature of a judicial act, which is not to be questioned in any collateral action between individuals. Wood *v.* Peake, 8 Johns. 69; Widdy *v.* Washburn, 16 Johns. 49; People *v.* Seaman, 5 Denio (N. Y.), 409, 412. It is also held that this doctrine is equally applicable to the decision of a *board of canvassers* declaring the result of an election for office. Their decision cannot be called in question collaterally, but only in a proceeding instituted directly to try the right to

elected, may be deemed a waiver or refusal to accept the election by the party elected.[1]

§ 789. **Presumptions in Favor of Regularity.**— Every reasonable intendment is to be made in favor of the regularity of the proceedings of a private corporation in their corporate acts.[2] This rule applies to corporate meetings and corporate elections; and also to the meetings of directors.[3] A corporate meeting, or a meeting of corporate directors, will be presumed to be regular unless the contrary appears.[4]

§ 790. **Eligibility for the Office of Director.**— Under most of the American statutes, no person is eligible for the office of director who is not a *bona fide* holder of shares in the corporation, and this is so under the English joint-stock companies act of 1862, and its amendments. The question in that country has frequently arisen, whether the mere transfer of the requisite number of shares to a person, in order to qualify him to act as a director, makes him liable as a contributory in the winding up of the company in respect of such shares; in other words, whether he can be a shareholder for the purpose of holding the office of director, and not a shareholder for the purpose of answering to creditors; and the courts of that country hold that he cannot be a shareholder and not a shareholder, according to the end in view.[5] A few decisions are met with in this country on the question of the qualifications necessary for the office of director. Whether a person is a *bona fide* holder of shares so as to qualify him, or whether his tenure of them is a sham, is of course

the office. People *v.* Seaman, *supra.* For further illustrations of the text, see Ellis *v.* North Carolina Institution &c., 68 N. C. 423; Waite *v.* Windham County Mining Co., 36 Vt. 18; Hastings *v.* Bluehill Turnpike Corp., 9 Pick. (Mass.) 80; Hudson River &c. R. Co. *v.* Kay, 14 Abb. Pr. (N. S.) (N. Y.) 191.

[1] Rex *v.* Jordan, Cas. temp. Hardw. 225.

[2] McDaniels *v.* Flower Brook Man. Co., 22 Vt. 274.

[3] State *v.* Kupferle, 44 Mo. 154; *s. c.* 100 Am. Dec. 265; Lane *v.* Brainerd, 30 Conn. 565, 577; McDaniels *v.* Flower Brook Man. Co., 22 Vt. 274.

[4] Sargent *v.* Webster, 13 Metc. (Mass.) 497; Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308; *s. c.* 11 Am. Rep. 253, 266; People *v.* Batchelor, 22 N. Y. 128. Compare Atlantic &c. Ins. Co. *v.* Fitzpatrick, 2 Gray (Mass.), 279.

[5] *Post,* § 1260.

a question of fact. Where shares were purchased by a *married woman* and the certificate was accidentally made out to her husband, who afterwards concluded to take the shares himself, and transferred the account from his wife's name to his own,— it was held that he was a *bona fide* holder of shares and eligible as director.[1] Under the statutes of Nevada, there is a doubtful holding that a person who "holds" shares of stock issued in his name is recognized as a stockholder, as well as one who "owns" them.[2] The inspectors of election cannot decide the question of eligibility for the office of director; it can only be decided by the courts.[3]

§ 791. Classification of Directors.— In several States there are statutes providing that the directors may be divided into three classes,— one class holding office for one year, one for two years, and one for three years,— the successors of each class being elected for three years.[4] In Illinois, the provision is that, by *resolution* of the stockholders, the board of directors may be divided into three classes, the first class re-elected at the next annual election, the next class at the second annual election, and the third class at the annual meeting held

[1] Re St. Lawrence Steamboat Co., 44 N.J. L. 529.

[2] State *v.* Leete, 16 Nev. 242. In this case, A. owning certain shares of stock in a corporation organized for the purpose of maintaining a ditch, etc., *gave them to his son*, with the request that new certificates should be issued in the son's name, and transferred upon the books of the company. This request was complied with. The son paid nothing for the shares, the transfer being made in order that he might be eligible to the office of trustee. It was held, on a review of the statutes of Nevada, that such transaction constituted the son a stockholder, and made him eligible to such office. (Belknap, J., dissenting). *Ibid.*

[3] Re St. Lawrence Steamboat Co., 44 N. J. L. 529. The statute of Connecticut (Laws 1876, ch. 65), providing that a director of a corporation owning stock *in another corporation* may be elected a director of the latter corporation, is not repealed by the joint-stock act of 1880. Chase *v.* Tuttle, 55 Conn. 455. That a by-law which would render a class of persons eligible to office who by the charter, are ineligible, is bad,— see Rex *v.* Bumstead, 2 Barn. & Ad. 699; Rex *v.* Spencer, 3 Burr. 1827. Where a person has a right to vote on stock as a stockholder, he is also eligible to any office to which a stockholder is eligible. State *v.* Ferris, 42 Conn. 560. That courts will not add by construction to the causes specified in a statute as rendering a person ineligible to office in a *municipal corporation*,— see Rex *v.* Chitty, 5 Ad. & E. 609; *s. c.* 2 Har. & W. 399; 1 Nev. & P. 78.

[4] Gen. Stat. Colo. 1883, chap. 19, § 126.

three years after the first annual election; each class therefore filled with directors elected for three years. All other vacancies are to be filled according to the by-laws.[1] So in Michigan, the directors may be divided into three equal classes, one of which shall hold office for one year, one for two years, and one for three years, and at subsequent elections directors may be elected for three years to succeed them.[2]

§ 792. **Holding Over.** — By the principles of the common law, the failure to elect officers of a corporation, public or private, does not dissolve the corporation, but the old officers hold over until their successors are chosen and qualified.[3] The same principle has been declared by statute in several States, out of abundant caution, as seen by the next section.[4] Accordingly, where the cashier of a bank has been appointed for a definite term, enters upon the duties of his office and gives bond, he continues in office until a new cashier is qualified by giving a bond, provided the State makes this qualification essential.[5] Where, however, the charter or governing statute fixes the term of office for a year, the directors cannot, against the will of the stock-

[1] Starr & Curt. Ill. Stat., p. 610, chap. 32, § 3.

[2] How. Mich. Stat. 1882, § 3317.

[3] Foot *v.* Prowse, 1 Strange, 625; Sparks *v.* Farmers' Bank, 3 Del. Ch. 274; Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 179; McCall *v.* Bryam Manuf. Co., 6 Conn. 428; Congregational Soc. of Bethany *v.* Sperry, 10 Conn. 200; South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Nashville Bank *v.* Petway, 3 Humph. (Tenn.) 522.

[4] People *v.* Jones, 17 Wend. 81; People *v.* Vail. 20 Wend. 12.

[5] Sparks *v.* Farmers' Bank, 3 Del. Ch. 274. The title of the person receiving the necessary votes to elect to a certain office is complete the moment the vote is declared, and the right of the former incumbent to hold over ceases. Booker *v.* Young, 12 Gratt. (Va.) 303. If the by-laws of a corporation provide that the clerk shall be chosen yearly, and also that he shall continue in office till another shall be chosen and qualified, and the first person chosen and qualified is *re-elected* the next year, he continues to be clerk under the first election, till he is qualified under the second. Hastings *v.* Blue Hill Turnpike Corporation, 9 Pick. (Mass.) 80. Under a statute directing that the clerk chosen by a school district should hold his office until another should be chosen and sworn in his stead, where the clerk of a school district *removed* into an *adjoining district*, but within the same town, and another was chosen in his place, but not *sworn*,—it was held that the first continued competent to act as clerk. Williams *v.* School District in Lunenburg, 21 Pick. (Mass.) 75. Where a charter speaks of "years" with reference to an office, *years of office*, and not calendar years, are intended. Rex *v.* Swyer, 10 Barn. & C. 486.

holders, enlarge this term by changing the time of holding the annual election, by a by-law or otherwise.[1] The above rule has no application to a *deputy*, whose term of office expires on the death of his principal.[2]

§ 793. Statutory Provisions that Directors shall Hold over. — Statutes in several of the States provide that, in default of an election, the directors shall hold over until their successors are elected and qualified.[3] Some statutes provide that a failure to elect officers shall not dissolve the corporation, but that the incumbents shall hold over.[4] The statute of Arkansas is still more explicit. Failure to hold an election at the time appointed does not dissolve the corporation, but the election may be held at any time during the year upon due notice given by the directors.[5] Another statute of Arkansas provides that corporations shall not be dissolved, if the election of directors, which has not taken place at the appointed time, shall be held *within ninety days* after such time, in the manner provided by the by-laws.[6] In Texas, the provision is that if the election of directors fails to come off on an appointed day, this does not dissolve the corporation, but it may be held on any other day in accordance with the mode prescribed by the by-laws.[7]

§ 794. Resignation of a Corporate Office.—According to an ancient strictness, where an office is granted by *deed*, the resignation or surrender ought also to be by *deed;* but, where an officer is appointed by election, the corporation may accept a resignation or surrender by parol.[8] Under provisions of a charter, which direct that an alderman or other officer may resign by giving *written notice* to the *city clerk*, and publishing a copy of such notice in the corporation papers, — a simple communication to the mayor and common council, tendering a resignation has been held ineffectual.[9] An intent to resign may be inferred from the acceptance of an incompatible office.[10] But the acceptance of

[1] Curtis *v.* McCullough, 3 Nev. 202; Elkins *v.* Camden &c. R. Co., 36 N. J. Eq. 467.

[2] Rex *v.* Corporation of Bedford Level, 6 East, 356.

[3] Deer. Code Cal., part 4, § 306; Comp. Stat. Neb. 1887, chap. 16, § 38; Rev. Stat. Minn. 1881, § 404; 2 Sayle Tex. Stat. 1888, art. 4125.

[4] Code Tenn. 1884, § 1705.

[5] Arkansas Dig. Stat. 1884, § 965.

[6] Ark. Dig. Stat. 1884, § 5432.

[7] Sayle Tex. Stat. 1888, art. 583.

[8] Rex *v.* Mayor &c. of Rippon, 1 Ld. Raym. 563; 2 Salk. 433.

[9] Lewis *v.* Oliver, 4 Abb. Pr. (N. Y.) 121.

[10] Verior *v.* Sandwich, 1 Sid. 305;

office by the members of one of the faculties of an old educational corporation, under a new corporation, does not in law amount to a resignation of their offices under the former, nor to a dissolution or suspension of its franchises.[1] There is much judicial authority to the effect that a *public officer* cannot at pleasure lay aside his office, — otherwise the wheels of government might be thereby stopped, which would be against public policy;[2] but it is assumed that this principle cannot apply in the case of an officer of a private corporation. It has been held that a person who has been elected to an office cannot resign the same before the time has arrived when he is entitled by law to possess it, and has become invested with its privileges by subscribing to the oaths, and giving the obligations required by law. Hence, an attempt on the part of one elected to an office to resign before he is made an incumbent, is abortive and ineffectual.[3]

Rex *v.* Goodwin, Dougl. 397, note 22; Milward *v.* Thatcher, 2 Durnf. & E. 87; Rex *v.* Patemen, *Id.* 779.

[1] Regents of University of Maryland *v.* Williams, 9 Gill & J. 365.

[2] It has even been held that an *overseer of the highways* cannot, at his pleasure, lay aside his office. A mere notification of the fact that he resigns is not sufficient to discharge him from his office; but his resignation, to be effectual, must be accepted by competent authority. State *v.* Ferguson, 31 N. J. L. 107.

[3] Miller *v.* Supervisors of Sacramento County, 25 Cal. 93.

CHAPTER XVI.

AMOTION OF OFFICERS.

§ 799. **Distinction between Amotion and Disfranchisement.**— "In a corporation," says Daly, F. J., "there is a distinction between what is called *amotion*, or the right to remove an *officer*, which is a power inherent in every corporation, and *disfranchisement*. The former may be exercised without interfering with the franchise,—as the officer, when removed, still continues a member; but disfranchisement is an actual expulsion of the member from the body and the taking away of his franchise, which cannot be done unless the power is given by the charter creating the corporation; or the member has been guilty of crime, a conviction of which would work a forfeiture of all civil rights, including the corporate franchise, or has committed acts which tend to the destruction of the corporation, such as the defacing of its charter, the obliteration or alteration of its records, or other acts tending to impair or destroy its title to its rights or privileges; in which case, the expulsion of the member is but the exercise of a power incident to the right of self-preservation."[1]

§ 800. **Observations of Mr. Willcock on this Question.**—Although in the leading case of Bagg,[2] much was said about amotion, and the grievance of Bagg was that he had been disfranchised as one of the twelve burgesses of Plymouth, Mr. Willcock, in his treatise on corporations, which is regarded as a good work, defines amotion as applicable only to officers, and says that it causes a cessation of the particular offices from which they are amoved, but in no manner affects their right to the freedom of the munic-

[1] White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162, 192; citing Evans *v.* Philadelphia Club, 50 Pa. St. 107; Baggs' Case, 11 Co. Rep. 93; Earle's Case, Carth. 173; Com. *v.* St. Patrick's Benevolent Society, 2 Binn. (Pa.) 441; *s. c.* 4 Am. Dec. 453; Fuller *v.* Trustees, 6 Conn. 532; People *v.* Medical Society, 24 Barb. (N. Y.) 570.

[2] 11 Co. Rep. 93; stated at length, *post*, §§ 854, 855.

ipality; whilst disfranchisement is applicable only to the freedom, and cuts off the corporator from all rights and privileges of the corporation. It appears, according to that authority, that there is *not* an incidental right in corporations to disfranchise their members, but that it must be claimed by prescription or express grant of the charter.[1] Mr. Willcock then makes the following among other observations upon that celebrated case: "At the time when James Bagg's case was before the court, their attention had been rarely attracted to the consideration of corporate causes, and the distinction between the right to the offices and the right to the freedom of a municipality had been little considered. The particular case was of amotion from office; the arguments were in general more applicable to disfranchisement, but there is a material difference in principle. The enjoyment of office is not for the private benefit of the corporator, but an honorable distinction which he holds for the welfare of the corporation; and therefore, though it be an office of *a freehold* nature, it is entirely conditional. . . . But the franchise of a freeman is wholly for his own benefit, and a private right; a right in the municipality similar to that of a natural subject in the State, of which he ought not to be deprived for any minor offense against his corporate fealty, any more than that for which, as a subject, he ought to be deprived of his franchise as a liegeman. For this reason, all minor corporate offenses, such as improper behavior to his fellow corporators, where not punishable by the general law of the land, as well as violations of his corporate duties, ought to be punished by penalties imposed by the ordinances of the municipality, and not by disfranchisement. But such offenses against the general law as occasion a forfeiture of all civil rights, import in themselves a forfeiture of the corporate franchise; and offenses against the corporation which tend to its destruction, such as defacing the charters, altering the corporate records so as to destroy the evidence of their title to privileges, or that of the title of his fellow corporators to their franchises, are of course causes of disfranchisement."[2]

[1] Willcock Corp. 270.

[2] Willcock Corp. 270; quoted with approval by Woodward, C. J., in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 113; and it was said by the learned judge that these observations are equally applicable to private corporations. This observation is perhaps

§ 801. These Observations Applicable to Corporations other than Municipal. — "These observations," said Woodward, C. J., quoting the language of Mr. Willcock in the preceding section, "relate to municipal corporations; but why are they not equally applicable to private corporations? The interest or 'freedom' which a member has in a private corporation is as a rule a 'franchise' as that which any of the burgesses mentioned in Bagg's Case had in the borough of Plymouth, and may often be a much more valuable franchise. Where it has been obtained by the payment of a pecuniary consideration, and property is held in connection with it, it is a vested estate, and certainly ought not to be sacrificed on account of minor offenses, which would not be permitted to forfeit individual interests in a municipal corporation. And if a power to disfranchise in a municipal corporation does not exist unless expressly granted, it is very safe to conclude that it is not inherent in a private corporation, and must have an express grant to support it.[1]

§ 802. Power of Amotion Inherent in Corporations. — By the principles of the common law, every corporation has an implied power, incident to its existence as a corporation, and independent of charter provisions, to remove an officer for cause.[2]

true, with the exception of private corporations having a joint stock.

[1] Evans *v.* Philadelphia Club, 50 Pa. St. 107, 113.

[2] Fawcett *v.* Charles, 13 Wend. (N. Y.) 473; State *v.* Trustees of Vincennes University, 5 Ind. 77; Lord Bruce's Case, 2 Strange, 820; Rex *v.* Doncaster, Barnard. 264; Rex *v.* Richardson, 1 Burr. 517, 539; People *v.* Higgins, 15 Ill. 110; Adamantine Brick Co. *v.* Woodruff, 4 MacArthur (D. C.), 318; Burr *v.* McDonald, 3 Gratt. (Va.) 215; Auburn Academy *v.* Strong, Hopk. (N. Y.) 278; cases cited, *post*, § 847. It was said in one case, in the King's Bench, that there are authorities (citing 11 Coke, 99; 1 Roll. Rep. 224; Palm, 451; Stiles, 477), that the power of amotion is not inherent in a corporation. Such a power must exist by charter or prescription in order to its exercise. Rex *v.* Mayor of Doncaster, 2 Ld. Raym. 1564, 1566. But the contrary is now established as stated in the text. Where a corporation time out of mind had power to remove an alderman for a reasonable cause, it was held that, though the corporation had taken a *new charter* wherein no such power was expressly given, yet the power still remained; since the new charter did not merge or extinguish any of the ancient privileges, but the corporation might use them as before. Haddock's Case, Sir T. Raym. 435, 439. "The power of amotion for adequate cause, is to be an inherent incident of all corporations, whether municipal or private, except, perhaps, such as are literary or eleemosynary; but the exercise of this power does not affect the private rights of the corporator in the franchise." Statement of Doctrine by Woodward, C. J., at *nisi prius*, in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 117, affirmed by an equal division

Speaking with reference to English boroughs, which are a species of municipal corporation, it has been held that, although the charter does not in terms authorize the removal of an officer, yet the power of removal is implied; it is incidental for self-preservation.[1] It follows that a *by-law* authorizing the removal of officers for cause may be good, although no power of amotion is expressly given by the charter, or is possessed by prescription.[2] On the other hand, a by-law restricting the discretionary power of removing a master or usher of a grammar school vested in the governors, as given by the charter has been held void.[3] The directors of a national bank have power to remove the president, both under the act of Congress relative to national banks, and under the articles of association, where such articles give express authority to remove; and it makes no difference that the bank has never adopted any by-laws.[4]

§ **803. Power Resides in Corporation alone, not in Judicial Courts.** — This power belongs to the corporation alone; the courts have no jurisdiction to order such removal.[5] As the courts have no jurisdiction to remove an officer of a corporation or to enjoin him from acting as an officer, a portion of a decree depriving such an officer of his salary on the ground of having violated the by-laws, no fraud being shown, was reversed as erroneous.[6] In New York a statute [7] formerly existed, author-

of the Supreme Court. *Ibid.*, 127. There is a short article on the subject of amotion, pointing out the distinction between amotion and disfranchisement; stating what offenses will justify an amotion; how the right to amove is affected by provisions of the charter; and the rights and liabilities of the officer amoved, — by W. E. Talcott, Esq., in 24 Cent. L. J. 94.

[1] Lord Bruce's Case, 2 Str. 819; Rex *v.* Richardson, 1 Burr. 517, 538; Rex *v.* Lyme Regis, Doug. 149.

[2] Rex *v.* Richardson, 1 Burr. 517, 539; *s. c.* 2 Ld. Ken. 85.

[3] Reg. *v.* Governors of Darlington School, 6 Q. B. 682.

[4] Taylor *v.* Hutton, 43 Barb. (N. Y.) 195; *s. c.* 18 Abb. Pr. (N. Y.) 16.

[5] Neall *v.* Hill, 16 Cal. 145.

[6] *Ibid.*

[7] 2 Rev. Stat. N. Y. (1st ed.), 462. This statute provided: "The chancellor shall have jurisdiction over directors, managers and other trustees and officers of corporations, . . . 3. To suspend any such trustee or officer from exercising his office, whenever it shall appear, that he has abused his trust: 4. To remove any such trustee or officer from his office, upon proof or conviction of gross misconduct: 5. To direct new elections to be held by the body or board duly authorized for that purpose, to

izing the judicial courts to suspend a director or officer of a corporation for certain causes. This, it was held, did not authorize an action by a stockholder to obtain such a removal or suspension. It was also held that if, in any case a creditor could maintain such an action under the statute, he must allege in his complaint the nature of his claims, when and how they arose, and the amount due, and he should demand payment before bringing his suit.[1] The courts would not, under this statute, interfere to suspend directors of a corporation on the ground of their having made improper expenditures touching the business of the corporation, nor on charges of personal immorality.[2]

§ 804. **Power Resides in the Body at Large, not in the Trustees.** — By the principles of the common law, the power of amotion of an officer of a corporation is regarded as a *constituent act*, — something which affects the organization of the corporation, — and therefore something which can only be done by the corporation at large, and not by the trustees or other governing body.[3] In this respect it stands on the same footing as the power to *elect* officers[4] and the power to establish *by-laws:*[5] it must be exercised by the corporation at large, or by its most numerous body or constituency, unless its charter or governing statute vests it in a smaller body. But it may be very much doubted to what extent this principle inheres in the modern law. In the case of municipal corporations, many corporate officers are *elected* by the votes of the qualified voters. But the *trial* of an officer before this numerous constituency, with the view of removing him from his office, is unheard of. It would be a revival of the trial before the Athenian Areopagus. Below the grade of director and such other officers as are elected by the corporation at large, the general rule is that the officers of private

supply vacancies created by such removal." This statute was *repealed* by N. Y. Laws of 1880, ch. 245, Rev. St. N. Y. (Banks & Bros. 8th ed.), p. 2672.

[1] Ramsey *v.* Erie R. Co., 7 Abb. Pr. (N. S.) (N. Y.) 156, 184; *s. c.* 38 How. Pr. (N. Y.) 193.

[2] *Ibid.*, 190. The power of a *State legislature* to remove trustees of an eleemosynary corporation for *disloyalty* for refusal to take a newly prescribed *oath of allegiance:* State *v.* Adams, 44 Mo. 570.

[3] Rex *v.* Mayor &c. of Lyme Regis, 1 Dougl. 149.

[4] *Ante*, § 729.

[5] *Post*, § 956.

corporations hold their offices *durante bene placito*, and are hence removable by the directors without assigning any cause for the removal, except so far as their power may be restrained by contract with the particular officer, — just as any other employer may discharge his employé. Speaking generally, it may be said that the power to appoint carries with it the power to remove. Thus, a power vested in the trustees of a corporation "to appoint a superintendent, who shall be subject to removal only for" certain causes, implies a power in the trustees to remove him for the specified causes.[1] On the other hand, the power to remove resides only in the body which has the power to appoint, unless it is vested, by the charter or by statute, in another body. Accordingly, it has been held that the trustees of an eleemosynary corporation cannot remove one of their number, in the absence of an express grant of power so to do, because of the incongruity of their possessing the power to *remove each other*.[2] In this respect, the distinction already pointed out[3] between the power of amotion and the power of expulsion becomes very important, for the directors who appoint a ministerial officer may undoubtedly remove him at pleasure, and he has no remedy other than an action for damages against the corporation for a breach of contract. But, on the other hand, where the power of expelling a member is vested in the corporation by general language, as, for instance, by the words "such corporation shall have the right to admit as members such persons as they may see fit, and expel any members as they may see fit," — this power cannot be *delegated* by the corporation to its directors.[4] Moreover, if the power of removal is vested in the trustees by the governing statute, this power is in the nature of a *trust* reposed by the law in them, to be exercised for the good of the corporation, and they cannot *surrender* it, or disable themselves from exercising it *by a contract* with the officer or employé.[5]

[1] People *v.* Higgins, 15 Ill. 110.

[2] Fuller *v.* Trustees, 6 Conn. 532, 545. But see State *v.* Vincennes University, 5 Ind. 77.

[3] *Ante*, § 799, *et seq.*

[4] State *v.* Chamber of Commerce, 20 Wis. 63.

[5] Thus, it was held that the trustees of the Auburn Academy have no power to make a contract with a teacher, limiting their right "to remove him at pleasure." Auburn Academy *v.* Strong, Hopk. (N. Y.) 278.

§ **805. Removal of Officers who Hold at Will.** — Before passing to the consideration of the causes for which corporate officers may be removed, we must renew our attention to the fact that, in private corporations, the ministerial officers who are not elected by the corporators at large for stated terms, but who are appointed by the board of directors, and who therefore sustain toward the corporation the relation of an employé toward an employer, serving for a compensation, which in general the directors do not receive, have no franchise in their office, and hence are removable at the mere pleasure of the directors, without the assignment of any cause, without the giving of any notice, and without any trial or investigation into the grounds of the removal. They are dischargeable, like any other employé, subject only to their right of action against the corporation for damages for a breach of the contract of employment.[1] A *mandamus* will not be granted to restore such an officer.[2]

[1] Adamantine Brick Co. *v.* Woodruff, 4 MacArthur (D. C.), 218; Burr *v.* McDonald, 3 Gratt. (Va.) 215. The board of directors of *Girard College* have power to remove an officer thereof, created by an ordinance of the city of Philadelphia, without assigning cause; and may, therefore, displace the steward of the college at their pleasure. See Field *v.* Directors of Girard College, 54 Pa. St. 233.

[2] Dighton *v.* Stratford-on-Avon, 2 Keb. 641; *s. c.* Sir T. Raym. 188. Frequent judicial expressions are met with on this subject in the old cases. Thus: "Where a man is elected to hold at will, in which case he may be removed at pleasure, without cause shown; yet if it doth not appear that the corporation hath declared their will to remove him, this court (the King's Bench) may grant him restitution. Quære: If the removal of the corporation be not a declaration of their will." Rex *v.* Slatford, Comb. 419. In an old case (Anno, 22 Car. 2) in the King's Bench the question was whether, where a corporation has an officer who holds his office *durante bene placito* of the mayor and aldermen, and they turn him out, and he prays for a *mandamus* to be reinstated, they are bound to show reasonable cause for turning him out. This question was resolved in the negative, and a writ of restitution was denied, although the officer had been turned out without notice. Dighton's Case, 2 Keb. 641; *s. c.* Sir T. Raym, 188. In another case, the plaintiff, being one of the common council of Coventry, was removed, and sued for a writ to restore him. The corporation returned that they had a custom to elect any one to be of the common council and to remove him *ad libitum*, and that the plaintiff was removed, etc. The court held that the return was good; and this difference was taken: That where a man is a freeman or alderman, etc., they cannot remove him from his freedom or place without cause; and in such case such a custom is void, because the party hath a freehold therein; but to be of council is a thing collateral to the corporation. Warren's Case, Cro. Jac. 540. It was held in another old case that where an officer

§ 806. Lord Mansfield's Classification of Grounds of Amotion. — The grounds of amotion, as stated by Lord Mansfield, were the following: "1. Such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to exercise any public franchise. 2. Such as are only against his oath and the duty of his office as a corporator, and amount to a breach of the tacit condition annexed to his franchise or office. 3. Such as are of a mixed nature, as being an offense, not only against the duty of his office, but also a matter indictable at common law." [1]

§ 807. In what Case there must be a Previous Trial and Conviction. —In the first of the three cases above catalogued by Lord Mansfield, offenses which have no immediate relation to the office, but are in themselves infamous, the officer cannot be removed unless there has been a previous indictment and conviction of the offense; "for," as was said by that eminent judge, "though the corporation has the power of amotion by charter

of a corporation was a tenant of the office at will, that is, was removable at the will of the corporation, and the corporation having removed him, and he having proceeded by *mandamus* to be restored, and they did not rely upon their mere power to remove him, but in their return to the *mandamus*, alleged a misdemeanor, and that was found to be insufficient, — a peremptory *mandamus* would issue, and this fine distinction was taken: "We do not determine whether there ought to be a good cause or not for such removal. But suppose it may be without cause, yet still they must determine their will. Now, they do not return a determination of his office by their will, as the reason why they do not admit him, but the special matter of his not taking the oaths; therefore, since his office continues, and this excuse is insufficient, he ought to be restored." Rex v. Mayor of Oxon, 2 Salk. 428.

[1] Rex v. Richardson, 1 Burr. 517, where Lord Mansfield discussed the whole subject at great length and with great learning. The same grounds of amotion were restated by Lord Mansfield in Rex v. Town of Liverpool, 2 Burr. 723, 732. Lord Mansfield's statement has been approved in numerous American cases: Evans v. Philadelphia Club, 50 Pa. St. 107, 114, per Woodward, C. J.; Commonwealth v. St. Patrick's Benevolent Society, 2 Binn. (Pa.) 441; s. c. 4 Am. Dec. 453; Commonwealth v. Guardians of the Poor, 6 Serg. & R. (Pa.) 469; State v. Chamber of Commerce, 20 Wis. 63. In these and other American cases it has been applied to the subject of the *expulsion of members*. *Post*, § 856, *et seq.* In Rex v. Tidderley, Siderfin, 14, it was decided that, as a corporation has power to accept the resignation of an officer, it for that reason has power to remove him from his office; "*et per consequence pur bone cause poient amover.*"

or prescription, yet, as to the first kind of misbehaviours, which have no immediate relation to the duty of an office, but only make the party infamous and unfit to execute any public franchise, — these ought to be established by a previous conviction by a jury, according to the law of the land; as in cases of general perjury, forgery or libelling, etc."[1] In the second and third cases mentioned by Lord Mansfield, where the matter concerns the relation of the officer or member to the corporation itself, it is not necessary, in order to the power of amotion, that there should first have been an indictment and conviction in the ordinary course of law; because, in respect of these offenses, the corporation possesses the power of *trial* as well as the power of amotion.[2]

[1] Rex *v.* Richardson, 1 Burr. 517, 538, 539.

[2] *Ibid.*; overruling on this point the *dicta* in Bagg's Case, 11 Coke, 99. In the second resolution in Bagg's Case, 11 Coke, 93, it was resolved: "That no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do it, either by the express words of the charter, or by prescription, but if they have not authority, neither by charter nor by prescription, then he ought to be convicted by course of law before he can be removed, and it appears by *Magna Charta*, cap. 29, *Nullus liber homo capiatur, vel imprisonetur aut disseisitur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, etc., nisi per legale judicium parium suorum, vel per legem terræ;* and if the corporation have power by charter or prescription to remove him for a reasonable cause, that will be *per legem terræ.* But if they have no such power, he ought to be convicted *per judicium parium suorum*, etc.; as if a citizen, or freeman, be attainted of forgery or perjury, or conspiracy, at the King's suit, etc., or of any other crime whereby he is become infamous, upon which attainder they may remove him. So if he become convicted of any such offense which is against the duty and trust of his freedom and to the public prejudice of the city or borough whereof he is free, and against his oath, as if he burned or defaced the charters or evidences of the city or borough, or razed or corrupted them, and is thereof convicted and attainted; these and the like are good causes to remove him." The above language, like many of the other so-called resolutions in the reports of Lord Coke, appears to consist of the valuable *dicta* of the reporter in his private capacity, rather than of the deliberate resolutions of the court upon the question before them in judgment. So it was subsequently viewed by Lord Mansfield, when the question came before the King's Bench whether a previous conviction of a criminal offense was necessary to enable a corporation to remove the person guilty of such an offense from a corporate office or franchise. Lord Mansfield said: "Previous conviction was not a circumstance at all necessary to the judgment in that case; for there was no sufficient cause of amoval at all. There, too, the actual removal was by the select body (the mayor and nine of the masters) which cannot be, except by charter, by-law, or prescrip-

§ 808. Misappropriating Money: False Charges of Money.—The mere misemployment of the money of a corporation is no

tion. There are three sorts of offenses for which an officer or corporator may be discharged: 1. Such as have no immediate relation to his office, but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise. 2. Such as are only against his oath and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office. 3. The third sort of offense for which an officer or corporator may be displaced is of a mixed nature; as being an offense not only against the duty of his office, but also a matter indictable at common law. The distinction here taken by My Lord Coke's report of this second resolution seems to go to the power of trial, and not to the power of amotion; and he seems to lay down 'that where the corporation has power, by charter or prescription, they may try as well as remove; but where they have no such power, there must be a previous conviction upon indictment.' So that, after an indictment and conviction at common law this authority admits 'that the power of amotion is incident to every corporation.' But it is now established 'that, though a corporation has express power of amotion, yet, for the first sort of offenses, there must be a previous indictment and conviction.' And there is no authority since Bagg's Case which says that the power of trial as well as amotion for the second sort of offenses is not incident to every corporation. In Lord Bruce's Case (2 Strange, 819), the court says 'the modern opinion has been, that a power of amotion is incident to the corporation.' We all think this modern opinion is right. It is necessary to the good order and government of corporate bodies that there should be such a power, as much as the power to make by-laws. Lord Coke says 'there is a tacit condition annexed to the franchise, which, if he breaks, he may be disfranchised.' Bagg's Case, 11 Coke, 98a. But where the offense is merely against his duty as a corporator, he can only be tried for it by the corporation. Unless the power is incident, franchises of offices might be forfeited for offenses; and yet there would be no means to carry the law into execution. Suppose a by-law made 'to give power of amotion for just cause,' such by-law would be good. If so a corporation, by virtue of an incident power, may raise to themselves authority to remove for just cause, though not expressly given by charter or prescription. The law of corporations was not so well understood and settled at the time of Bagg's Case as it has been since. And 'whether a power of amotion was incident to the corporation' could be no part of the question in judgment in that case, or necessary to the determination of it. The power of amotion was there exercised by the select body, and the cause was insufficient; the offense not being any of the three kinds for which a corporator could be disfranchised. And the distinction there taken as to the mode of trial, is certainly not law. For though the corporation has a power of amotion by charter or prescription, yet, as to the first kind of misbehaviors, which have no immediate relation to the duty of an office, but only make the party infamous and unfit to execute any public franchise; these ought to be established by a previous conviction by a jury according to the law of the land; as in cases of general perjury, forgery or libeling,

cause of amotion, when it does not amount to a *breach of trust.*[1] But charging the corporation with money which the *member* never had paid, is a good cause of disfranchisement.[2]

§ **809. Bribery.** — *Bribing* a corporator to vote for a particular candidate at the corporate election;[3] and *receiving a bribe*, in the case of a common councilman under a charter conferring power to remove for disorderly conduct,[4] have been held sufficient to warrant an amotion.

§ **810. Misconduct in Respect of Duties toward the Corporation.** — Misconduct, in order to be a ground of removal, must be specially connected with the execution of the office, and the result of *improper motives.*[5] Under this head, the act of

etc. We therefore think that the court was well warranted in Lord Bruce's Case, to controvert the authority of the proposition, collected from what is said in Bagg's Case 'that there can be no power of amotion, unless given by charter or prescription;' and we think that, from the reason of the thing, from the nature of the corporations, and for the sake of order and government, this power is incident, as much as the power of making by-laws." Rex *v.* Richardson, 1 Burr. 517, 538, 539. In an old case, upon a *mandamus* to restore to the place of a burgess of Winton, it was returned, that they were a corporation by prescription, and that power was in the mayor and burgesses to remove any burgess that should do anything contrary to his oath, or to the detriment of the corporation upon proof of the offense, that he had put out several officers contrary to the custom, and had razed the corporation book, putting out one name and putting in another. This return was excepted to on the ground that a corporation could not, without special custom, disfranchise a member without proof of the offense by a trial at law, and this was insisted upon, upon the authority of Bagg's Case, 11 Coke, 93. But Lord Holt, C. J., seemed not to be of this opinion. He said: "If a man be guilty of perjury, forgery, etc., he is not to be removed before conviction; but here the razing the corporation book, etc., is not only an offense at common law, but against the duty of his place." But the case was adjourned without a decision of the point. Rex *v.* Chalk, Comb. 396.

[1] Rex *v.* Chalke, 1 Ld. Raym. 226; Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 473.

[2] Com. *v.* Guardians of the Poor, *supra.* See also Rex *v.* Mayor &c of London, 2 Durnf. & E. 177; *post*, § 863.

[3] Rex *v.* Mayor &c. of Tiverton, 8 Mod. 186;

[4] State *v.* Jersey City, 25 N. J. L. 536.

[5] Regina *v.* Mayor of Newbury, 1 Q. B. 751, 762; Bagg's Case, 11 Coke, 93. In an old case *mandamus* was awarded to restore the relator to his franchise as a *capital burgess*, from which he had been removed for alleged failure to pay over moneys received for the corporation, in his capacity of chamberlain, etc. The

making a *riotous disturbance* at a corporate election has been held a good ground of amotion.[1] A mere *threat* or *attempt* to do an improper act, no injury actually resulting, has been held not sufficient.[2] In numerous cases at common law, the using of *opprobrious* or *insulting language* to a fellow-member or officer of the corporation, has been held not ground of expulsion or amotion.[3] But an analysis of the cases shows a strong disinclination on the part of the courts to hold the speaking of *slanderous words* a ground of amotion. A custom of the corporation of London to *disfranchise* merely for speaking disrespectful words to an alderman, at a meeting called a wardmote, has been held void. It was so held with reference to the following words, which were spoken to Sir Robert Jefferyes, one of the aldermen of London, at a wardmote which was held in a church: "If I am church warden next year, you shall ask my leave to keep your wardmote here;" upon which Sir Robert Jefferyes called the person uttering the words a *rogue* and a *rascal*, to which the latter replied, "I have as much to do here as you; you think sure you are here among your Bridewell birds; you are mistaken." The point of the last remark lay in the fact that Sir Robert Jefferyes was also governor of the Bridewell prison. Lord Holt, C. J., said that,[4] "since no information or indictment will lie for these words at common law, it was a great question, whether this custom, to proceed in an-

reason given was that the allegation of the offenses in the return was not *specific* and that it did not appear that the power of amotion lay in the corporation. Rex *v.* Mayor of Doncaster 2 Ld. Raym. 1564; *s. c.* 1 Barn. 264. It was held no ground for amoving the recorder of an incorporated town that, acting in his capacity of a voter and not in his capacity as justice of the peace, he had *given an erroneous opinion* that it was not competent for the mayor to adjourn the poll without the consent of the candidates, it clearly appearing that the opinion was sincerely given. Rex *v.* Corporation of Wells, 4 Burr. 1999.

1 Haddock's Case, T. Raym. 435; Rex *v.* Mayor &c. of Derby, Cas. t. Hardw. 153.

2 Bagg's Case, 11 Coke, 93.

3 Bagg's Case, 11 Coke, 93, 98; Clerk's Case, Cro. Jac. 506; Clark's Case, 1 Ventr. 327; Rex *v.* Guilford, 1 Lev. 162; Rex *v.* London, 2 Lev. 201; Regina *v.* Rogers, 2 Ld. Raym. 777; Inness *v.* Wylie, 1 Carr. & K. 257. In Inness *v.* Wylie, 1 Carr. & K. 257, it was held that a member of a society might be expelled for using improper language to a fellow-member, though no such action is provided for in its rules, if property rights are not involved.

4 Reg. *v.* Rogers, 2 Ld. Raym. 777.

other manner than the common law would allow for words, would be good. For the common law has provided a particular method for punishment of scandalous words, viz., binding to the good behavior; such words being a breach of the peace."[1] There is other judicial authority for the proposition that, even where the power of removal exists, a trustee cannot be removed for disrespectful and contemptuous language toward his associates, although the language is of such a character as to be characterized as "highly indecorous and deserving of the censure of all honorable men;" and although the language is not confined to a single occasion, but consists of numerous expressions on various occasions, misrepresenting the doings of the board, charging its members with being governed in their official acts by a spirit of *sycophancy*, falsely charging them with holding *secret meetings*, and calling them *rascals*, *scoundrels* and *Turks*.[2]

§ **811. Offenses Touching the Corporate Record.**—*Alteration* of the corporate records, with a *fraudulent intent*, is ground for amotion; but the fraudulent intent is essential, and must be averred;[3] but the *refusal to deliver* over the corporation books

[1] A *mandamus* has been used to restore a member of the common council of a borough, who was amoved from his membership in the common council, though not disfranchised of his freedom in the corporation, for speaking slanderous words of one of the aldermen, namely, for saying that he was a *knave* and deserved to be posted for a knave all over England. In this case Twisden (who appears to have been a judge) said: "That his place there could no more be forfeited than his freedom; for he was chosen thereunto by the custom of the place. And *magna charta* is, that a man shall not be disseized *de liberis consuetudinibus*. But he held that words might be a cause to turn out a freeman, — as if they were that the mayor or the like did burn the charters of the town, or other words that related to the duty of his place. But in the case at bar the words do not appear to have been in reference to the corporation; wherefore it was ordered that he should be restored." Jay's Case, 1 Ventris, 302. It has been held not a sufficient cause of *disfranchising* a member of a corporation that he was charged with "having assisted, as president of the society, in defrauding the society of the sum of fifty cents," or with "defaming and injuring the same in public taverns." Com. ex rel. *v.* German Soc., 15 Pa. St. 251.

[2] Fuller *v.* Trustees, 6 Conn. 532, 546. The court said: "What these trustees might have done to one of their number who had committed a crime which would banish him from society, it is not necessary to decide."

[3] Rex *v.* Chalke, 5 Mod. 257; 1 Ld. Raym. 225; Mayor &c. of Wigon *v.* Pilkington, 1 Keb. 597.

intrusted to his custody, as the proper officer, to a person applying for them with an order from the corporation is not sufficient.[1]

§ **812. Neglect of Duty.** — A ministerial officer of a corporation, who is under the immediate inspection of the trustees, is removable by them from his office for gross neglect of duty.[2] But where the neglect of duty on which it was sought to justify the removal of a *trustee* of an eleemosynary corporation consisted merely in not performing his duty as one of a committee of the board, in relation to an award of prizes to school children for declamations, it was said that it could not be seriously insisted that such an omission should subject him to an amotion.[3]

§ **813. Non-attendance at Corporate Meetings.** — It may be regarded as settled at common law that a prolonged and obstinate non-attendance by the officer of a corporation at the corporate meetings will be good cause of amotion, though a single or casual non-attendance will not be.[4] It has been held, in the case of recorders of incorporated towns, that non-attendance and failure to assist at the sessions to direct the corporation in the proceedings of justice, was a good cause of forfeiture of the office of recorder. But this decision rests on the ground that the duties of recorder are of such a nature as to require his *constant presence*.[5] It was laid down by Lord Mansfield that, in order to justify the amotion of a corporate officer for non-attendance at corporate meetings which were appointed to be held upon *other than upon stated days*, it was necessary to show that *notice* of the particular business for which the meeting had been called had been given to them. An allegation that "due notice was given of the holding thereof respectively," was not sufficient.[6] The non-attendance of a *single member* of a corporate board is not necessarily a cause of removal, although the office is of a

[1] Anon., 1 Barnard. 402; Regina *v.* Bailiffs &c. of Ipswich, 2 Ld. Raym. 1232; Rex *v.* Ingram, 1 W. Bl. 50.

[2] Murdock *v.* Phillips' Academy, 12 Pick. (Mass.) 244 (*professor* in a theological seminary).

[3] Fuller *v.* Trustees, 6 Conn. 532, 546.

[4] Rex *v.* Wells, 4 Burr. 1999.

[5] Rex *v.* Bailiffs of Ipswich, 2 Salk. 434, 435. See also Rex *v.* Harris, 1 Barn. & Ad. 936.

[6] Rex *v.* Richardson, 1 Burr. 517, 527. See also Rex *v.* Carlisle, 1 Strange, 385.

public nature. This has been held in respect of the non-attendance of an *alderman* at the court of sessions, since the non-attendance of one member does not prevent the holding of the court.[1]

§ 814. Ineligibility: Subsequent Election to Another Office. — It has been held that the cause for which an officer is removed must be something which has arisen subsequently to the admission to the exercise of his office, and that the power of amotion cannot be exercised for a defect of original qualification.[2] On the other hand, the election or appointment to a *second office* and the acceptance thereof, the holding of which is *inconsistent* with the holding of the former, operates as a removal from the former.[3] A by-law providing that, "when any director shall die, resign, neglect to serve, or remove out of the country, the board may proceed to supply the vacancy," does not empower the board to create a vacancy. They cannot oust a director because they differ from the stockholder as to his eligibility, nor because he fails to attend a called meeting, nor because he is not a citizen of the commonwealth. Legal questions must be settled in the courts. Questions of fact, such as the existence of an actual vacancy by removal after election or neglect of duty by a member of the board, may be settled by the directors, and the resulting vacancies, if any, may be filled by them; but this is the extent of their power in the premises.[4]

§ 815. Other Grounds of Removal. — Among the causes for which the right of amotion has been upheld at common law, may be mentioned the *non-residence* of aldermen of an incorporated town,[5] though a *temporary* non-attendance was held insufficient;[6]

[1] Queen *v.* Mayor &c., of Pomfret, 10 Mod. 107.

[2] Rex *v.* Mayor &c. of Lyme Regis, 1 Dougl. 79.

[3] Rex *v.* Pateman, 2 Durnf. & E. 777; Staniland *v.* Hopkins, 9 Mees. & W. 178.

[4] Detwiller *v.* Commonwealth, 131 Pa. St. 614; *s. c.* 18 Atl. Rep. 990.

[5] Rex *v.* Truebody, 2 Ld. Raym. 1275; *s. c.* 11 Mod. 75; Holt, 449; Rex *v.* Mayor of Exeter, Comb. 197; Vaughan *v.* Lewis, Carth. 227; Rex *v.* Mayor &c. of Lyme, Regis, 1 Dougl. 144. That a *change* in the boundaries of wards, does not vacate the office of a councilman, see Scoville *v.* City of Cleveland, 1 Ohio St. 126.

[6] Rex *v.* Leicester, 4 Burr. 2087, 2089. Compare Ex parte Butler, 1 Atk. 215; Rex *v.* Harris, 1 Barn. & Ad. 936; Vaughan *v.* Lewis, Carth. 227;

the omission to take the *oath of office;*[1] in the case of an *alderman*, being too *poor* to pay his municipal *taxes*.[2] But on the other hand, the mere fact that the member of a common council of an incorporated town became *bankrupt*, was not ground of removal, in the opinion of Lord Mansfield, since it did not disable him from discharging his corporate duties.[3] So, it has been

Rex *v*. Exeter, Comb. 197; 4 Mod. 33; Rex *v*. Doncaster, Say. 37.

[1] Where the return to a *mandamus* showed that the ground of removal was that the person entitled to hold the office had failed to take the *oath of allegiance*, the question was stirred whether, under such circumstances, the party must take the oaths at his peril or whether the magistrate must tender them to him. It was held that he must take them at his peril, that the magistrate need not tender them to him, but he must tender himself to the magistrate and demand them, and if it be refused, must sue out a *mandamus*, and the magistrate is punishable. Rex *v*. Mayor of Oxon, 2 Salk. 428. Compare Rex *v*. Master &c. of St. John's College, Skinn. 546; Rex *v*. Ellis, 2 Strange, 994. As to a refined distinction between swearing *by* and *before* the mayor, see Rex *v* Ellis, *supra*.

[2] Rex *v*. Mayor &c. of Andover, 3 Salk. 229.

[3] Rex *v*. Mayor &c. of Liverpool, 2 Burr. 723. "His mere being a bankrupt," said Lord Mansfield, "is no objection to his continuing a corporator; it is no offense against the duty of his office. He may become a bankrupt without his own fault. And there is no census requisite as a qualification to be a corporator. Indeed some one or more of the consequences of bankruptcy may eventually become a cause of amotion: but the bankruptcy itself is not so. A man may be able to pay above twenty shillings in the pound, notwithstanding his being in strictness a bankrupt; or he may very soon obtain a certificate, after the commission is issued. It is no offense against the law of the land. Bankrupts are not now considered as criminals, whatever the old act may intimate of this kind. A man may certainly be a bankrupt, without being guilty of any crime whatsoever, and may really be worth a large surplus on a balance. Sir Stephen Evans and the Woodwards and many others have been instances of this. And this disfranchising for becoming bankrupt might be made a very bad use of, by juntoes in corporations, or under particular circumstances, and with particular views. A run upon a man of great fortune and credit may be artfully managed so as to reduce him to bankruptcy. And there is no difference between a common councilman's becoming a bankrupt, and an ordinary freeman's becoming so. As to the trust and power over the revenues of the corporation — this man is only one member of the number of one and forty, who have amongst them the the power of voting corporate acts: but he has nothing to do with the receipt, or trust, or management, or fingering of the money; nor can have anything to do with it, unless the rest should, by a corporate act of their own, trust him with it. Therefore the having become a bankrupt, and not having obtained his certificate under the commiision awarded against him, is not, of itself alone, sufficient to disqualify him from being a member of the common councll of this town; whatever might have been the case, if certain eventual consequences had

held that *old age* is not a sufficient ground of removing an alderman;[1] nor is *intoxication*,[2] unless it reaches the grade of *habitual drunkenness*.[3] The fact that a member of a city common council has been expelled from office does not render him *ineligible* for re-election, and if re-elected he cannot be again removed for the same cause.[4] And in general, where there is a *franchise* in the office, so that it is in the nature of property, and hence under the protection of the law, the officer cannot be removed on grounds of mere expediency or convenience, or unless he has forfeited his office for one of the causes mentioned in the statutes of the institution.[5]

§ **816. Statutory or Charter Power of Removal.** — As already stated, where the organic law is silent, the corporation possesses the *inherent power* of removing its officers.[6] But where the charter prescribes the *terms* under which the power is to be exercised, they must be pursued.[7] If the governing statute defines the causes for which an officer may be removed, he cannot, it has been held, be removed for any other cause, — the statute being interpreted in conformity with the principle *expressio unius exclusio alterius*.[8] So, the power, conferred by the charter, of *expelling*, has been held not to authorize a *suspension*.[9] A provision in a governing statute, or in the foundation of a private charity, that visitors "shall and may" remove officers, for specified causes, is imperative; in such a case "shall and may" are equivalent to *must*.[10]

§ **817. What Corporate Action Necessary.** — Some corporate action is of course necessary to remove a corporate officer —

happened to follow therefrom." Rex *v.* Town of Liverpool, 2 Burr. 723, 732; *s. c.* 2 Esp. 324.

[1] Hazard's Case, 2 Rolle, 11.

[2] Rex *v.* Taylor, 3 Salk. 231.

[3] Taylor *v.* Gloucester, 1 Rolle, 409; *s. c.* 3 Bulst. 109.

[4] State *v.* Jersey City, 25 N. J. L. 536.

[5] Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244.

[6] *Ante*, § 802.

[7] State *v.* Treasurer of Vincennes University, 5 Ind. 77.

[8] Shaw *v.* Mayor &c. of Macon, 19 Ga. 468.

[9] State *v.* Jersey City, 25 N. J. L. 536.

[10] Attorney-General *v.* Lock, 3 Atk. 164.

something that distinctly signifies the *corporate will* that he shall no longer be an officer.[1] In those cases where the office is in the nature of a franchise, the officer cannot be removed without the agency of a *tribunal*, competent to investigate the cause, and pronounce the sentence of the loss of right. The office is not *ipso facto* vacant by neglect or abuse; wrongs do not thus execute their own punishment; but an act done, or the exercise of power, is requisite to work the forfeiture, and determine the title to the office.[2] Provisions in the articles of an English banking company, that if any person chosen to act as the public registered officer of the company should become bankrupt, he should be disqualified and his office become vacant, have been construed to mean that his office was to become vacant at the *election of the company;* but if, after the bankruptcy, they treated and held him out to the world as their public registered officer, they might sue and be sued in his name.[3] Under the conceptions of the old law, an officer appointed under the *common seal* could only be discharged by an instrument authenticated in the like manner.[4] But, as we shall see hereafter, the necessity of a corporate seal as an evidence of a corporate act, is no longer required by the modern law, except in those cases where an individual, acting in the same way, would be required to act under seal.[5] Even under old conceptions, it was not necessary that the removal of a mere ministerial officer should be made by the corporation under its common seal.[6] An officer appointed by *resolution* only, and holding during pleasure, might be removed by a mere resolution rescinding the former one.[7] Resolutions of a corporation suspending or removing an officer, in a place at a distance, are not to be regarded as *taking effect*, so as to terminate the liability of his *sureties*, until

[1] Murdock *v.* Phillips' Academy, 12 Pick. 244; Doremus *v.* Dutch Reformed Church, 3 N. J. Eq. 332; State *v.* Trustees of Vincennes University, 5 Ind. 77; Rex *v.* Ponsonby, 2 Brown P. C. 311; Rex *v.* Heaven, 2 Durnf. & E. 772; Com. *v.* Pennsylvania &c. Institute, 2 Serg. & R. (Pa.) 141.

[2] State *v.* Trustees of Vincennes University, 5 Ind. 77.

[3] Steward *v.* Dunn, 12 Mees. & W. 655; 1 Dowl. & L. 642; 13 Law J. (N. S.) Exch. 324; 8 Jur. 218.

[4] Rex *v.* Chalke, 1 Ld. Raym. 225; Rex *v.* Mayor &c. Rippon, 1 Ld. Raym. 563.

[5] *Post,* § Ch. 106, Art. I.

[6] Dighton *v.* Stratford-on-Avon, 2 Keb. 641.

[7] Regina *v.* Thomas, 8 Ad. & E. 183; 3 Nev. & P. 288; 2 Jur. 347; Rex *v.* Chalke, 1 Ld. Raym. 225.

the necessary time for communicating them has elapsed.[1] If an officer be liable to removal at the pleasure of the corporation, the choosing another person to fill the office is a declaration of the pleasure of the corporation.[2]

§ **818. Power must be Exercised at a Corporate Meeting.** — The power to amove an officer, whether possessed as incident to the corporation at large, or vested in a particular body, must appear to be exercised at a meeting duly assembled and holden in the corporate character, or at least holden in the character by virtue of which they are empowered to amove. Thus, where it appeared, by the return to a *mandamus* that the common council had the power of amotion, and it was alleged as a fact that the party complaining was removed by thirty of the common councilmen, in the council chamber assembled, the court held this to be insufficient, because it did not appear "that the thirty councilmen, in the council were then and there assembled *as a common council* — as they might be there to feast, or for other purposes not connected with their corporate character."[3]

§ **819. And by a Majority Vote.** — As already seen in respect of corporate elections,[4] the general rule, in the absence of different provisions in the charter, governing statute or valid by-laws, is that, where a quorum is duly assembled, a majority of the quorum may decide any question which comes before the meeting. Accordingly, it has been held, under a charter which requires corporate acts in general to be done by a majority of the corporation, that an officer, if a member, can only be removed by a majority of all members, *counting himself*. Amotion being an act of an odious nature, all clauses of the charter concerning it must receive a strict interpretation. The officer is not excluded from voting, as a member, upon the question, by his personal interest.[5]

[1] McGill *v.* Bank of United States, 12 Wheat. (U. S.) 511.

[2] Rex *v.* Mayor of Canterbury, 11 Mod. 403; 1 Strange, 674; Attorney-General *v.* Corporation of Poole, 8 Beav. 75.

[3] Rex *v.* Taylor, 3 Salk. 231.

[4] *Ante*, § 725, *et seq.*

[5] Reg. *v.* Sutton, 10 Mod. 74. The return to a *mandamus* to restore an alderman who had been amoved upon divers charges, alleged that the power had been executed *per majorem et bergenses* (by the mayor and bur-

§ 820. Necessity of Notice and a Judicial Inquiry. — If the officer has no *franchise* in the office, — if, in other words, the nature of the office is a mere *employment*, so that he is removable *at pleasure*, — then, in conformity with principles already stated,[1] he is not entitled to notice of any investigation into his conduct with the view to his removal, or of any proceeding to remove him.[2] But the corporation may discharge him, as any other employer may discharge his employé, without assigning any cause, but subject to the liability of an action for damages for breach of contract, if by discharging him its contract with him is broken. But where there is a *franchise* in the office — where the right to hold it is analogous to the right of a member to hold his membership, — then, by analogy to principles hereafter stated in regard to the expulsion of members of corporations,[3] the officer is entitled to *notice* of any proceeding to investigate his conduct, with a view to his removal, and of the grounds of complaint, and to a fair opportunity to be heard in the defense; otherwise his removal will be *void*.[4] It is, in general, absolutely necessary, not only that he should be summoned generally to attend, but that he should have a *particular summons* to attend and answer the particular charge alleged against him; for it would be highly unjust, upon a general summons, to remove a man for particular offenses, which he may have had no opportunity of preparing to answer.[5] He is entitled to have the offense with which he is charged "fully and plainly, substantially and formally, described to him."[6] In a case carrying with it the great authority of the name of Lord Coke, it is said: "And although they have

gesses) generally, and it was held that this was sufficient; but the case is obscure and not of much value. Rex *v.* Brayfield, 2 Keb. 488.

[1] *Ante*, § 805.

[2] Rex *v.* Mayor &c. of Coventry, 1 Ld. Raym. 391; 2 Salk. 430; Rex *v.* Mayor &c. of Oxon, 2 Salk. 428; Rex *v.* Mayor &c. of Canterbury, Stra. 674; Dighton *v.* Stratford-on-Avon, 2 Keb. 641; Rex *v.* Deighton, 2 Keb. 656.

[3] *Post*, § 881, *et seq.*

[4] Rex *v.* Richardson, 1 Burr. 517; Rex *v.* Mayor &c. of Liverpool, 2 Burr. 723; Rex *v.* Mayor &c. of Doncaster, *Id.* 738. Jarvis *v.* Mayor &c. of N. Y., 2 N. Y. Leg. Obs. 396.

[5] Delacy *v.* Neuse Navigation Company, 1 Hawks (N. C.), 274; *s. c.* 9 Am. Dec. 636; Commonwealth *v.* Pennsylvania Beneficial Institution, 2 Serg. & R. 141; Black &c. Society *v.* Vandyke, 2 Whart. (Pa.) 309; City of Exeter *v.* Glide, 4 Mod. 33; Bagg's Case, 11 Coke, 93.

[6] Murdock *v.* Phillips' Academy, 12 Pick. (Mass.) 244; Murdock's Appeal, 7 Pick. (Mass.) 303.

lawful authority, either by charter or prescription, to remove any one from the freedom, and that they have just cause to remove him; yet if it appears by the return, that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void and shall not bind the party; *quia quicunque aliquid statuerit parte inaudita altera, æquum licet statuerit, haud æquus fuerit*, and such removal is against justice and right."[1] In considering the legality of the removal of a professor in an incorporated institution of learning, the Supreme Judicial Court of Massachusetts held that the proceeding to remove such corporate officer is a *judicial proceeding*, and that to render it legal, there should be: (1) a monition or citation to him to appear; (2) a charge given to him, which he is to answer; (3) a competent time assigned for proofs and answers; (4) liberty of counsel to defend him, and to except to proofs and witnesses; and (5) a solemn sentence after a hearing of proofs and answers.[2] The notice seems to be in the nature of an *indictment*, in so far that, if an officer, after being notified that he will be tried upon a certain charge, is *tried upon a different charge* and removed upon such charge, the variance will be fatal, and he will be restored by *mandamus*.[3] Though the summons to the officer, against whom the proceeding to remove him from the office is taken, be defective, as where it fails to set a time when he should appear, yet if he *did appear*

[1] Bagg's Case, 11 Coke Rep. 99.

[2] Murdock *v.* Phillips' Academy, 12 Pick. 244. In an old case of *mandamus* to restore an alderman who had been removed from his office on divers charges, it was returned that the meeting to which the alderman had been summoned and the amotion were on *the same day*, and it was argued that this was not reasonable notice. For the corporation, the contention was that the notice was sufficient, the defendant being in town and not requiring longer time. The court held that the summons was sufficiently alleged, but the case is somewhat obscure upon this point. It would seem from the report that the alderman was summoned at a meeting, and that he was removed on the same day on which this meeting took place, to wit, on the 18th of December, 1668. Rex *v.* Brayfield, 2 Keb. 488.

[3] It was so held, where the notice to the recorder of an incorporated town "was to answer as to his non-attendance at a session of oyer and terminer, and therewith he was charged; whereas he was turned out for non-attendance at a sessions of the peace, and answered to that, though not charged therewith; which the court held incurable and fatal, and ordered a peremptory *mandamus*." Reg. *v.* Bailiffs of Ipswich, 2 Salk. 434, 435; *s. c.* 2 Ld. Raym. 1232.

and answer this will cure the informality of the notice; "for though a man ought to be prepared and have convenient time for that, yet he may *waive* its benefit if he will."[1] Courts of equity proceed on the same principles, where they acquire jurisdiction on the ground of *trust*. Where the power to remove is *not absolute*, at the mere will and pleasure of the trustees, such as the power which the master exercises over his servant, but is a *discretionary power*, to be exercised in the due execution of the powers and trusts reposed in them, so that it is under the control of the court of chancery, a removal upon an *ex parte hearing*, without giving the officer an opportunity of being heard or of making a defense, will be set aside.[2]

§ 821. Exception in the Case of Continued Desertion and Non-Residence.— The old cases, or at least some of them, went upon the doctrine that, where the officer of a corporation was removed by reason of continued non-residence, no notice to show cause why he should not be removed was necessary.[3] In one case it was strongly pressed upon the court, that the officer had not received any such notice or summons to attend and show cause, that it was contrary to natural justice that a man should be disfranchised without being heard what he had to say for himself; but the court disallowed this objection, saying: "If a capital burgess quite leaves the borough, and goes and resides altogether in another place, there is no need of summoning him before he is removed; and it is sufficient ground for turning him out; otherwise, if he only left the borough for a while for his health's sake."[4]

[1] Reg. *v.* Bailiffs of Ipswich, 2 Salk. 434, 435; Rex *v.* Mayor &c. of Wilton, 2 Salk. 428; Rex *v.* Chalke, 1 Ld. Raym. 225.

[2] Willis *v.* Child, 13 Beav. 117; *post*, § 828.

[3] Rex *v.* Leicester, 4 Burr. 2087, 2089.

[4] Rex *v.* Truebody, 2 Ld. Raym. 1275; *s. c.* 11 Mod. 75; Holt, 449. According to the report in 11 Modern, and in Holt, Truebody had been summoned to attend and did not; but in 11 Modern Mr. Justice Powell is made to doubt whether it was necessary to summon him. In another old case, three of the judges held that, where an alderman had been removed from his office because he had left the city and continued to reside elsewhere, it was not necessary for the *mandamus* sued out to restore him, to show, in order to be good, that he had been summoned to answer those matters which were alleged against him in the return; it was sufficient that it showed that.

§ 822. Conduct of the Trial: The Evidence. — It does not follow from the preceding, that the corporate judicatory is obliged to conduct the trial with all the *formality* and under the rules prescribed for a trial in a court of law.[1] For instance, where the trial took place before the visitors of a charitable corporation, it was held that they were not required to conduct it with *open doors*, nor to admit more than one witness at a time.[2] Nor were they obliged to admit the *declarations* of the accused in explanation of his conduct, though they might do so if they should think proper.[3]

§ 823. Assembling a Meeting for the Trial: Notifying the Members. — As hereafter pointed out, when speaking of a meeting assembled to try a member with the view to his *expulsion*, it must be kept in mind that, by the principles of the common law, *all* who are entitled to participate in the trial must be summoned. As already seen with reference to corporate elections, if the body is not composed of any definite number, a majority of those who actually attend may usually act;[4] whereas if it is composed of a definite number, such as a board of directors or trustees, or a defined corporate judicatory, it is not only necessary that all should be summoned, but a vote of a majority of all is necessary to pass the sentence.[5] In respect of the manner of notifying the members who are entitled to participate in the trial, in the absence of a rule prescribed by a governing statute or by-law, the *customary method* employed by the corporation will be sufficient. Thus, where it had been for many years the custom of an incorporated medical college to notify the members of its board of trustees of meetings of the board, by mailing to each member a *postal card*, it was held that such a

he was summoned generally. Lord Holt expressed the opinion that if his desertion be a cause of removal, yet if he returned before his removal and resided in the city, then he ought to be summoned; but he admitted that the summons was not necessary where the party is always out of the city. "And here," said he, "certainty is required to every intent, because the party hath not answered." But the other judges held that the general allegation of a summons in the return was sufficient, and a *mandamus* was refused. Rex *v.* Mayor of Exeter, Comb. 197, 198.

[1] *Post*, § 893, *et seq.*

[2] Murdock's Appeal, 7 Pick. (Mass.) 303.

[3] *Ibid.*

[4] *Ante*, § 725.

[5] *Ante*, § 726.

notice was sufficient, for the purpose of assembling the board to remove a person who held the office of professor in the college, and that it would be *presumed* that notices so mailed had been received.[1]

§ 824. Instances under the Foregoing Rules. — A committee of the trustees of an incorporated institution of learning, appointed to inquire into its affairs, examined the *professors* and others, and made a report respecting one of the professors, founded on statements made by himself, and by others who were not examined in his presence. The trustees, without notice to him, voted that, in view of the report, etc., his connection with the institution ought to be dissolved. After failing to induce him to resign, a committee of the trustees made a report recommending his removal, and sent a copy of it to him, informing him that he might make any communication in regard to it, and might have the aid of counsel in preparing testimony or arguments, but that he could not be heard by counsel; and did not offer to file specific charges and maintain them by proof in his presence, and refused him access to the documents on which their report was (in part, at least) founded, and which related to the charges intended to be relied on; and, upon his refusing to appear before them, they voted on the reasons and facts stated in the report, and without other evidence or hearing, that the report be accepted, and that he be removed from office. It was held (independently of the first vote of the trustees, by which they disqualified themselves to act judicially on the question of removal) that the professor had not had the benefit of a trial, and that the vote of the trustees was ineffectual to remove him from his office.[2] - - - - An act of the legislature of Illinois, establishing the "Illinois State Hospital for the Insane," incorporated certain individuals and their successors in office, as trustees, constituting them a body politic, and it also created the office of *medical superintendent* of that institution, and provided that the trustees should have charge of the general interests thereof; that they should appoint the superintendent, assistant physician and steward, and fix the amount of their salaries; that the superintendent should be a skillful physician, and be appointed for the term of ten years, and that he should be subject to removal only for infidelity, or on account of incompetency. It was held that the trustees had the right to remove the superintendent for the causes specified, when-

[1] People *v.* Albany Medical College, 26 Hun (N. Y.), 348; (reversing *s. c.* 10 Abb. N. C. (N. Y.) 122; 62 How. Pr. (N. Y.) 220.)

[2] Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244.

ever either of them existed; that, had the law been silent as to the tenure of the office, and on the subject of removal, the court would not hesitate to hold that the power of amotion was incidental to that of appointment, and that the trustees might remove the superintendent without assigning a specific cause, whenever, in their judgment, the best interests of the institution should require it. The court took the view that, in cases of this sort, where the law is silent as to the mode of proceeding, reference must be had to the nature of the case, to determine what course justice requires the removing power to pursue in exercising its jurisdiction. It is not necessary that the cause assigned for removal should be stated in the precise language of the statute; if it embraces it, that is sufficient.[1] - - - - The distinction between these two cases grows out of the different conceptions which the two courts entertained of the rights of the corporate officer, under the principles of the common law and the provisions of the charter. The Massachusetts court proceeded upon the ancient common-law conception that such an office is in the nature of *property*, and that the incumbent of it cannot be deprived of the property right which he possesses in it without *due process of law*. But the Illinois court regarded it as a mere *employment*, under which the officer held under the trustees of the institution *durante bene placito*, and was hence removable without notice or a trial.[2]

§ **825. Review of Proceedings by Certiorari.** — In the case of *public municipal boards*, the writ of *certiorari*, as it existed at common law, is used to review their proceedings. In strictness, it is supposed that the office of this writ, when so used, is limited to keeping the inferior board within its jurisdiction, which it effects by quashing its proceedings, when they are had in excess of its jurisdiction. But the reviewing courts proceed on grounds so loose, that some of their decisions amount to an affirmation of the view that whenever the board acts *illegally*, in a sense violative of the rights of the petitioner, they act beyond

[1] People *v.* Higgins, 15 Ill. 110.

[2] The law of Massachusetts in regard to the particular institution seems to have been peculiar in this, that the visitors were empowered to hear appeals from the decisions of the trustees, and to review and reverse any censure passed by the trustees upon any professor, and to admonish or remove a professor for neglect of duty, etc. The court also held that the common law of England, as to the visitation of eleemosynary corporations, was the law of Massachusetts, except so far as it had been repealed, as to the visitors of the particular institution, by the statute of 1823, ch. 50, § 3, which gave an appeal to the Supreme Court from their decrees or sentences. Murdock's Appeal, 7 Pick. (Mass.) 303.

their jurisdiction. In New York it is said that only *errors of law* affecting materially the rights of parties may be corrected in this proceeding, and that the evidence may be examined, in order to determine whether there is any *competent proof* to justify the adjudication which has been made.[1] On the other hand, it has been decided that "if the inferior tribunal had jurisdiction, and if there was *evidence* legitimately tending to support its decision, and if no rule of law was violated, its adjudication was final." [2] It has been added, in respect of a proceeding by *certiorari* to review the act of a board of police commissioners in dismissing the petitioner from the police force: "As the board of commissioners do not constitute a court, its proceedings are not to be controlled or decided by the same degree of formality that would be required upon a charge of a criminal offense before ordinary tribunals of justice. A general charge made, such as is here presented [a charge of neglect of duty, specifying it] would seem to be sufficient to answer the purpose intended, and within the requirement of the law under which the proceeding was conducted." [3] From the foregoing observations and quotations, it would seem that this writ is used in New York as largely as a *writ of error*, on a record containing a bill of exceptions, would be employed.[4] It should be added that no precedent has come to the attention of the writer for the use of the writ of *certiorari* for the purpose of reviewing the proceedings of the judicatories of strictly *private* corporations or societies, in removing their officers or expelling their members.

§ **826. Extent of Relief in Equity.** — The jurisdiction of equity over corporations is generally confined to the two heads of *trust* and *fraud*. It has no power to declare a forfeiture of a

[1] People *v.* Board of Police, 69 N. Y. 408.

[2] People *v.* Board of Fire Commissioners, 82 N. Y. 358. These principles were reaffirmed in People *v.* Board of Police Commissioners, 93 N. Y. 97.

[3] People *v.* Board of Police, 93 N. Y. 97. See also People *v.* Police Commissioners, 23 Hun (N. Y.), 353; People *v.* Police Commissioners, 20 Hun (N. Y.), 402.

[4] See generally as to the office of this writ, Jordan *v.* Hayne, 36 Iowa, 9, 15; Hannibal &c. R. Co. *v.* Board of Equalization, 64 Mo. 294; House *v.* Clinton County Court, 67 Mo. 522; State *v.* Chicago &c. R. Co., 89 Mo. 34; Chicago &c. R. Co. *v.* Young, 96 Mo. 39.

charter.[1] Nor can it wind up a corporation, except where the power is given by statute, or where it comes to it as an incident of some of the heads of its jurisdiction. It has no superintendence over the officers of a corporation, except to hold them answerable, and to restrain them, in cases of frauds and breaches of trust, and to compel them to account as trustees.[2] It has no power to award an injunction, indefinitely suspending an officer of a corporation from the exercise of his functions; for this is an indirect mode of removing him from office, and the power of amotion does not reside in the judicial courts, and especially not in the courts of equity.[3] But, as hereafter seen, this jurisdiction is constantly involved in the case of *expulsions* from *unincorporated societies*,[4] in the case of schisms in religious corporations,[5] and in even the case of other corporations.[6] But it has been refused, to reinstate *directors* who have been removed by a vote of the shareholders.[7] Where, under the statute or other instrument which governs the execution of a *trust*, the trustees have the power of removing an officer at will, an officer removed by them will be reinstated by a court, if it appear that they have exercised their power *dishonestly* or *corruptly;* otherwise not.[8]

[1] *Post,* § Chs. 91, 155.

[2] See Neal *v.* Hill, 16 Cal. 145.

[3] Griffin *v.* St. Louis &c. Asso., 4 Mo. App. 595.

[4] *Post,* § 910.

[5] *Post,* § 911.

[6] *Post,* § Ch. 89.

[7] Inderwick *v.* Snell, 2 Hall & T. 412; 14 Jur. 727; 19 Law J. Ch. 542; 2 Macn. & G. 216.

[8] "I think," said Sir R. Malins, V. C., "the clear result of the numerous authorities cited on both sides in the argument in this case, is, that all arbitrary powers, such as the power of dismissal, by exercising their pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they all must be presumed to have been until the contrary is shown, and that the burthen of showing the contrary lies upon those who object to the manner in which the power has been exercised. No reasons need be given; but if they are given, the court will look at their sufficiency. . . . The real question is, whether this resolution [of dismissal] is valid; and it must be so if it is the result of the fair and honest opinion of the governing body. . . . With them the legislature has left the decision of that question; and so it must be left by this court, unless I can see that a decision has been arrived at for some corrupt, improper or collateral object. . . . It is impossible for this court, when Parliament has put it so absolutely in the power of the governing body, to interfere. I repeat that, according to the construction of the act of Parliament, my opinion is, that every head-master of a public school, that is of the great

§ 827. Illustration: Dismissal of Schoolmaster under English Public School Act of 1868. — The plaintiff, who was appointed head master of Rugby School, in November, 1869, by the old trustees of the school, who were then the governing body, was dismissed by the new governing body, appointed under the Public School Act of 1868, in December, 1873. He filed his bill in equity against the governing body, alleging that his dismissal was due to the influence of certain members of the governing body who, prior to their election, had shown hostility to the plaintiff's appointment, and had formed a scheme to procure its annulment; and praying that the resolution of dismissal might be declared invalid. It was held, on demurrer, by Sir R. Malins, V. C., that the court was not justified in interfering. It was also held that, although the plaintiff was appointed by the old trustees in 1869, the new governing body were not bound by the rules and regulations in force previously to their appointment, but had a power of dismissal unfettered by those restrictions. The Vice Chancellor proceeded on the ground that, under section 13 of the above statute, the new governing body had power to dismiss the plaintiff without notice and without assigning any reason; and that, as they had exercised their power of dismissal *fairly* and *honestly* and not corruptly, or for the purpose of effecting some collateral object, their decision was not subject to be re-tried by the court.[1]

§ 828. Where the Power to Remove is Discretionary in the Due Exercise of the Powers of the Trustees. — A conclusion somewhat different from the foregoing was reached by Lord Romilly, M. R., in a case where the power was given to the trustees to remove the schoolmaster, "upon such grounds as they should at their discretion, in the due exercise and execution of the powers and trust reposed in them, deem just." It was held that this was not a mere arbitrary discretion of removal, but that it was a discretion subject to the control of the Court of Chancery; and further, that it was not competent, in the exercise of such discretion, for the trustees to remove the schoolmaster upon an *ex parte* examination of charges against him, without giving him an opportunity of being heard and of making a defense.[2] In so

public schools, — for I believe every one of them is subject to this act, — (referring to the Public Schools act of 1868, 31 & 32 Vict. c. 118) — that every head-master is as much at the mercy of the governing body as a coachman is at the mercy of his master, and can be dismissed with or without reason; they are not obliged to give any reason whatever, and the court must presume that they exercise their discretion properly unless the contrary is shown." Hayman *v.* Governors of Rugby School, L. R. 18 Eq. 28, 68, 85, 87; *s. c.* 30 L. T. (N. S.) 217. See *post*, § 917.

[1] Hayman *v.* Governors of Rugby School, L. R. 18 Eq. 28; *s. c.* 30 L. T. (N. S.) 217.

[2] Willis *v.* Child, 13 Beav. 117.

holding, Lord Romilly, M. R. said: "The powers which are given in such a case as this, like all powers to be exercised for the benefit of others, or for purposes more or less public, must, in one sense, be deemed to be held in trust. There are many powers, in that sense, held to be trusts, which cannot be enforced or controlled in this court. But here is a power defined by this court for the purpose of carrying into execution a charitable trust, and, it must, I think, be considered, that the word 'trusts' was added to the word 'powers' for the purpose of keeping in view that it was a trust for the execution of which the court was providing; and the employment of the word 'trust,' especially when considered with reference to the direction to preserve a statement of the grounds of removal, appears to me to have the effect of restricting the large meaning of the word 'discretion,' contained in the earlier part of the clause. I am, therefore, of opinion, that the regulation does not confer upon the trustees an arbitrary power to dismiss the master, upon any grounds which they may deem just, free from any control of this court. Considering that the trustees are not the only and absolute judges of the sufficiency of the grounds of removal upon which they have acted, and that they are subject to the jurisdiction and control of this court in the execution of the trusts reposed in them, it becomes necessary to inquire into the manner in which they have acted in the present case." And being satisfied that they had acted improperly, his lordship granted an *injunction* to restrain them from removing the schoolmaster.[1]

§ **829. Mandamus to Reinstate.** — *Mandamus* is the ancient remedy at common law to restore an officer of a corporation who has been unlawfully amoved.[2] The use of this writ in the English King's Bench extended only to matters of *public* right, and therefore it was not granted to restore an officer of a strictly *private* corporation.[3] But the ancient corporations in

[1] Willis *v.* Child, 13 Beav. 117, 129.

[2] Fuller *v.* Plainfield Academic School, 6 Conn. 532.

[3] Hence, an application for a writ to be directed to a company of gunmakers, commanding them to restore an approver of guns who had been deprived of his place, was refused. Vaughan *v.* Company of Gunmakers, 6 Mod. 82; *s. c.* 2 Ld. Raym. 989. The report of an old case runs thus: "The court refused to grant a *mandamus* to restore *attorney* of corporation of Canterbury, though a franchise for life, being only private; so of solicitor; *contra* of town clerk." Hurst's Case, 1 Keb. 349. Where the corporation was a private one, such as the corporation of Lincoln College in Oxford, a *mandamus* was refused to restore a *fellow* who had been expelled, on the ground that his remedy was an appeal to the visitors. Lord Holt, C. J., said: "Here is a visitor, to whom an appeal may be, the matter is only examinable before

England, whether municipal or otherwise, were mostly regarded as *public* in their character, and would be classed as public corporations in our day; the joint-stock corporation being a modern invention. Running through the old precedents, we find that a *mandamus* has been granted to restore a *jurat*, turned out upon a claim that the corporation held power to amove him at pleasure, — the court finding that no such power existed;[1] to admit a *fellow* to a scholarship, who had been nominated by the City of Bristol, which city had, under the foundation, the right to nominate two fellows;[2] to restore a person to the office of *clerk* of the company of masons of London;[3] to restore to his office the *high bailiff* of Westminster;[4] to restore *common councilmen;*[5] and to *enfranchise* an *apprentice* of a corporation at the end of his apprenticeship according to the custom;[6]

him, and no where else. Such a college is a *lay* corporation, and if no particular visitor be appointed, the founder and his heirs are visitors. If it be in case of an ecclesiastical or spiritual corporation, and no visitor appointed, the bishop of the diocese is visitor. This is a *private* corporation; it in no way concerns the publick; and we will not grant any *mandamus*, and so it was ruled in this court in Ailoff's Case, who was fellow of All Souls." Dolben, J., also said: "I remember Dr. Robert's Case, who was a poor man, and the court was very willing to have helped him, but my Lord Hale said he could by no means grant a *mandamus*, for that he had taken his place subject to those terms, and as it were secret conditions; and he could no more complain of his ill usage, than a man could do of an ill award, to which he had submitted." The court therefore refused to put the college to the expense of making return to an alternative *mandamus*. Parkinson's Case, Comb. 143.

[1] Crips *v.* Mayor of Maidstone, 1 Keb. 812.

[2] Rex *v.* St. John's College, Comb. 238. Lord Holt, C. J., said: "The visitor shall determine all that relates to persons who are of the foundation; but here is a collateral interest in Bistol; there is no part of the college; the visitor hath no power before a person be made a member." See note, *infra*.

[3] Stamp's Case, Comb. 348.

[4] Rex *v.* Westminster, Comb. 244.

[5] Brett and Johnson's Case, Comb. 214; Williams' Case, 2 Keb. 558; State *v.* Common Council of Jersey City, 25 N. J. L. 536.

[6] Weber *v.* Zimmerman, 22 Md. 156. "Serjeant Holloway prayed a *mandamus* to enfranchise an apprentice presented by his master, according to the custom, at the end of the seven years at court day, before mayor and bailiffs of Oxon, they having refused to make him free, which the court conceived without precedent; for hereby they might engross the freedom; as barrister, if the bench refuse to call him, in Inn of Court, hath no remedy; so there is no remedy to elect mayor, etc.; *contra* to swear one elected secondary to the clerk of the crown." Townsend's Case, 1 Keb. 458. On a later day, "the court conceived that a

to restore a person to the office of sexton;[1] at the suit of a *school district* to compel the committee of the district to reinstate a

mandamus ought to issue to swear him according to the precedent 13 Car. 1. in Norwich, where every one by custom is a lawful freeman, that hath served seven years; and notwithstanding they refused to swear him, for which cause a *mandamus* was granted." Townsend's Case, 1 Keb. 470; Rex *v.* Townsend, 1 Keb. 659. It was laid down, as early as the year 1670, by Lord Hale and his colleagues that a *mandamus would not lie to restore the fellow of a college* who had been deprived of his fellowship by the sentence of the visitor. The judgment in this case is particularly valuable for the observations of Lord Hale. He said: "There is a reason given in Dyer why a *mandamus* will not lie in the case there, namely, because it was prayed to be awarded to a temporal corporation." Further on he said: "That a *mandamus* lies, I will not positively deny; but whether it is fit for us to proceed after this return? It must be taken for granted, that it is not a spiritual corporation; if it were you ought to appeal to the visitor, and then to the delegates. It is a private society, as an Inn of Court; and I confess, that *mandamuses* do generally respect matters of public concern. I never heard of a *mandamus* for a monk. If there be a jurisdiction in the visitor, and he hath determined the matter, how will you get over that sentence? The chancellor is visitor of all the king's free chapels, and 2 H. 5 doth make him so of all colleges of the king's foundation. Suppose a temporal court, over which we have jurisdiction, doth give judgment in assize to recover an office; so long as that judgment stands in force, do you think we will grant a *mandamus* to restore him against whom the judgment is given? . . . At this rate we should examine all deprivations, suspensions, elections, etc., and by the 13th of the queen, the laws of the university are confirmed. We ought not to grant a *mandamus* where there is a visitor; but in this case the visitor hath given sentence." Appleford's Case, as reported in 1 Mod. 82, 84, 85; *s. c.* 2 Keb. 799; 1 Lev. 23, 65; 2 Lev. 14; Sir T. Raym. 56, 94, 100; Sid. 94, 152, 346. The report in Keble is very brief and appears even less accurate; it is as follows: "Turner showed cause against a *mandamus* to restore to a fellowship in New College in Oxford, because he had appealed to Evesque Winchester, the local visitor, and thereof produced the bishop's certificate. Hale, C. J., said 26 ed. 3. in chancery a *mandamus* was granted, and so of latter time; and albeit these are no such public officers, for which a *mandamus* lieth; yet having been granted, this matter ought to come in by return, and certificate is not sufficient; which the court granted, notwithstanding Dr. Robert's Case, and a *mandamus* was granted." In Dr. Robert's Case, just cited, "Crooke prayed a *mandamus* to restore him to the fellowship in Jesus College in Oxon; on affidavit that he had applied to the visitor, and he would not meddle. 1. Keeling, C. J., conceived a *mandamus* ought to be granted, this having been ruled an estate of freehold; and that such gave voice in choosing the knight of the shire; and though the thing were spiritual, yet the means are temporal to it, as *quare impedit* of a church. 2. Windom opposed it because Evesque hath a freehold, yet no *mandamus* lieth to consecrate; also the appeal to the ordinary is the proper remedy, and he

[1] Ile's Case, Ventr. 143, 153; Rex *v.* Guardians of Thame, 1 Stra. 115.

teacher removed by them;[1] to compel the *trustees* of an endowed *dissenting meeting house*, to admit a minister who was duly elected;[2] to restore *directors* of a *banking corporation*, who have been refused the exercise of their rights as directors by a majority of the board;[3] to restore a *pastor*, constituted by the charter of the church a corporator, who was removed *without notice* being given to the congregation, as prescribed by the constitution of the society. But such a *mandamus* would not be granted where there was any *other* plain legal *remedy*.[4] It was refused by the King's Bench where it was applied for to restore one of the proctors of doctor's commons, the court proceeding on the ground that conusance of such matters was vested in the *ecclesiastical*, and not in the temporal courts.[5] In an American case the idea has been put forward that the right to the remedy by *mandamus* rests on clearer grounds where the office from which the relator has been

is of right bound to act in it. And by Twisden. 3. There is no remedy, but by assize, if he be ousted; and action sur case, if he be not admitted; which 4. Moreton agreed, and the way of restitution being chalked out, he can have no other. Keeling, C. J., said, a *mandamus* lieth to Evesque, to admit a clerk, where two patrons differ, and to consecrate, and to induct, else there would be a wrong without a remedy; and the act of parliament that Car. 1. establisheth the jurisdiction of the Archbishop in several colleges in Oxford, doth expressly distinguish between his visitation in matters of faith, and his visitation of colleges, which are lay; and the court being thus against the Chief Justice, there was no *mandamus* granted; but they would advise." Dr. Robert's Case, 2 Keb. 102. Compare Rex *v.* Patrick, 1 Keb. 610 and 183; *s. c.* 2 Keb. 65, 68. The same rule was made in a case determined some years before, in the 14th year of Charles II. The court proceeded on the same ground, namely, that the power of removal lay in the visitor,—"Car le visitor est fidei commissiarius, etc. Nota que coment plusors del colledge sont lay le corporation poit estre spiritual, et ne poit estre monstre que cest court unque graunt restitution al monke ou prior dat, etc., uncore plusors des monks in Angleterre fueront lay, car coment fueront notaries uncore ne fueront in orders." Witherington's Case, Sid. 71. That a *mandamus* would not lie to restore a fellow of a college, see also Parkinson's Case, Carth. 92; *s. c.* 3 Mod. 265; 1 Show. 74; 1 Comb. 143; Prohurst's Case, Carth. 168.

[1] Gilman *v.* Bassett, 33 Conn. 298.

[2] Rex *v.* Barker, 3 Burr. 1265; 1 Wm. Black. 300, 352.

[3] Prieur *v.* Commercial Bank, 7 La. 509.

[4] High Etr. Rem., § 15.

[5] "Because this was an ecclesiastical office, and a matter properly and only cognizable in that court; and that the temporal courts are not to intermeddle or inquire into this sentence, or into the proceedings in any matter whereof they have a proper jurisdiction, but are to give credit thereunto." Lee's Case, Carth. 169; *s. c.* 3 Mod. 332; 3 Lev. 309; Skin. 290; 1 Show. 217, 251, 261.

removed is *not attended with pecuniary profit*, — the reason being that, having sustained no pecuniary loss, he cannot redress the injury which has been put upon him by an action for damages.[1]

§ 830. Several Writs where there are Several Officers.—Where several officers, standing in the same grade of office, have been removed, and proceed by *mandamus* to be restored, each ought to proceed separately.[2] "Five persons cannot have one writ of *mandamus* to be restored; for though the end of the writ is to do justice, yet the foundation is the wrong in turning them out, and the turning out of one is not the turning out of another; nor can several persons join in an action on the case for a false return."[3]

§ 831. Allegation of the Writ. — Where the writ of *mandamus* to restore an officer, did not allege, in direct terms, that the corporation was then in existence, but alleged that, in October, 1825, a year before the commencement of the proceeding there was, and for more than thirty years antecedent thereto had been, a body politic and corporate, created and established by the legislature of the State (naming it), — it was held that this was a sufficient allegation of the existence of the corporation; for, "as one of the attributes of a corporation aggregate is immortality, it is a sufficient averment of its continuance."[4] - - - Where the object of the proceeding by *mandamus* was to restore the petitioner, who had been removed from the office of trustee, it was objected that the writ did not show the *existence of such an office*, or that if such an office existed, any rights, duties or privileges appertained to it. The writ averred that the corporation or body politic was established by the name of the Trustees of the Academic School, etc.; that the plaintiff was one of the trustees duly elected, and in the exercise of the office and enjoying the rights and privileges belonging to him as trustees; that nine of the trustees, being a majority, were present at a meeting, on the 14th of February, 1826, and removed and expelled the plaintiff from the office of trustee. It was held that these allegations were sufficient, on a trial on the writ and return.[5] - - - - Where the writ of *mandamus* averred that the corporation was established by

[1] Fuller *v.* Trustees, 6 Conn. 532, 546. Compare Rex *v.* Barker, 2 Burr. 1266.

[2] Rex *v.* Mayor of Chester, Comb. 307.

[3] Andover's Case, 2 Salk. 433, per Holt, C. J.; *s. c.* Holt 441.

[4] Fuller *v.* Academic School, 6 Conn. 532, 543.

[5] *Ibid.*

the name of the Trustees, etc.; that the plaintiff was one of the trustees, duly elected and enjoying the rights and privileges belonging to him as trustee; and that he continued to hold and exercise such office, until he was removed therefrom, — it was held that the *office* of trustee, its *tenure* and *duration*, and the *privileges* pertaining thereto, were sufficiently alleged.[1]

§ 832. What if Directed to the Individuals by Name, and not to the Corporation. — It is not a fatal objection to the writ of *mandamus* to restore an officer of a corporation who has been removed from his office, that it is directed to the members of the corporation by name, instead of being directed to the corporation by its corporate name.[2] The old practice seems to have been to quash the writ, where it was directed to the corporation by a wrong name. Thus, in one case, "the court held the writ naught because it was directed to the corporation by a wrong name." But the writ of *mandamus*[3] need not be directed to the whole corporation; it will be sufficient if it is directed to those members who are to do the act commanded. "Though it should be true," said Lord Holt, C. J, "that a mandatory writ might be directed to the whole corporation, yet it could not be necessary it should be directed to more than those, or that part of the corpration that was summoned in the execution of the thing required; for it is not in the power of others to put the command of the writ in execution."[4]

§ 833. The Return to the Mandamus. — *Mandamus* was never allowed to restore an officer, removed for adequate cause, on the ground of mere *irregularities* in the mode of removal;[5] and anciently the adequacy of the cause was judged of exclusively by the return which the corporation made to the *mandamus;* for, as is well known, until the rule of the common law was changed by statute,[6] the return was conclusive and not

[1] *Ibid.*

[2] Fuller *v.* Academic School, 6 Conn. 533, 543.

[3] Rex *v.* Mayor of Rippon, 2 Salk. 432.

[4] Rex *v.* Mayor of Abingdon, 2 Salk. 699; *s. c.* 1 Ld. Raym. 559 (overruling Holt's Case, 2 Jones, 52).

[5] Rex *v.* Griffiths, 5 Barn. & Ald. 731.

[6] By Stat. Anne, chap. 20, the person suing out a writ of *mandamus* might plead to or traverse all or any of the material facts contained in the return, to which plea or traverse the person making the return may plead, take issue, or demur.

traversable; but the only remedy of the party aggrieved, in case the return falsified the facts, was an action for damages for a false return.[1] If the plaintiff was not satisfied with the return, it was the practice for him to bring an *action* on the case *for a false return*, and if, in such action, the return should be falsified by the verdict of a jury, the court would then award him a peremptory *mandamus*.[2] As the return could not be traversed in the particular proceeding, the court fell into great strictness in construing it, and in requiring it to set out the facts with exactness and precision. It was held that it must be certain to every intent; and accordingly the old books abound in decisions which now seem to us to involve an absurd strictness in construing the words of such returns. This strictness continued long after the reason on which it was founded had ceased to exist. Notwithstanding the statute of Anne already quoted, Lord Mansfield in one case said that he took it to be settled that the same certainty was still required in the return as before the statute; though at first it might have been otherwise determined, because the reason was not the same. But Buller, J., said that the certainty to a certain intent in general was all that was requisite; which meant what, upon a fair and reasonable construction, might be called certain without regarding the possible facts which did not appear.[3] In the severity of the old rule the relator had some advantages. If the return was insufficient, it seems that it could not be *amended*. Where it was held bad for *repugnancy*, a peremptory writ was granted.[4]

[1] Audley's Case, Latch. 123, 124; Anon., 2 Salk. 428; *s. c.* 1 Ld. Raym. 125, *sub nom.* Green *v.* Pope.

[2] "When the action is brought for a false return," said Lord Holt, C. J., "and if it is falsified, we cannot refuse a peremptory *mandamus*." Buckley *v.* Palmer, 2 Salk. 430; Rex *v.* Mayor of Abingdon, 2 Salk. 431, per Lord Holt, C. J.

[3] Rex *v.* Lyme Regis, Doug. 148. Compare Rex *v.* Mayor of Liverpool, 2 Burr. 731; Rex *v.* Bailiffs of Morpeth, 1 Strange, 58.

[4] Accordingly, where the return at first *admitted* that there had been an election of the relator to the office, and then avoided the election by setting up that he had procured his election by *bribery*, "*et quod non fuit electus*,"— it was held that here was a repugnancy, and that a peremptory writ ought to go. Reg. *v.* Mayor of Norwich, Holt, 444. So also when the return stated that the relator was on such a day *electus et perfectus;* then showed for cause of removing him, his non-attendance at the session; then stated that he had not taken the sacrament within a year before his election, and that therefore his election was null and void,— the court

That the prosecutor has in due manner *resigned* his office, is, of course, a good return to a *mandamus* to restore.[1] So, it is good ground for quashing a writ of *mandamus*, granted to restore a person to the office and functions of pastor under the charter of a religious society, that the petitioner was *subsequently disqualified* from holding such office under the charter.[2] "*Non fuit electus*" is a good return to a *mandamus* to induct into an office.[3] The same consequence followed where it contained a *negative pregnant*.[4] Moreover, in order to be a good return, it was necessary that it should *traverse the facts* alleged in the writ, and not the *conclusions*.[5] Where the relator founded his right to the office upon an election, it was necessary for the return to set forth the *manner* of the election, in order to support its allegation that the relator was not duly elected.[6] It was required to traverse the essential allegations of the writ, concerning the charter of the corporation, or else show that the defendants had complied with the provisions of the charter as described in the writ. When, therefore, the writ described the constitution of the corporation in certain terms, it was not a good return to de-

was of opinion that the return was bad, by reason of the repugnant and contradictory matter (citing Holt, 444); and that the returns to *mandamuses* were to be kept to the same strictness, since the *mandamus* act, *nono annæ*, as before; and a peremptory writ was granted. Reg. *v.* Mayor of Pomfret, 10 Mod. Rep. 107.

[1] Rex *v.* Mayor of Rippon, 1 Ld. Raym. 563; 2 Salk. 433.

[2] Weber *v.* Zimmerman, 23 Md. 45.

[3] Reg *v.* Twitty, 7 Mod. 83; Reg. *v.* Corp. of Cornwall, 11 Mod. 174. And see Reg. *v.* Aldborough, 10 Mod. 101, 199.

[4] Where the object of the *mandamus* was to compel the defendants to certify the election of a person as recorder of York, the writ saying that the corporation being duly assembled proceeded to the election of a recorder and the return "that the corporation were not duly assembled to proceed to the election of a recorder,"—it was held that this was bad, because it was a negative pregnant. Rex *v.* Mayor of York, 5 T. R. 66.

[5] Accordingly where the writ set forth all the proceedings touching the election to a corporation office and concluded with the words "by reason whereof, A. was elected;" it was held a bad return to say that "he was not elected." The defendants should traverse one of the facts alleged which went to show that he was elected. Rex *v.* Mayor of York, 5 T. R. 66.

[6] The report of an old case runs thus: "Nota, that four several retorns on four several *mandamus's* to restore to places of aldermen, etc., within that corporation, were *quasht, per curiam*, for saying they were not duly elected generally, without setting forth the manner, etc." Rex *v.* Mayor of Stafford, 2 Keb. 264.

scribe the constitution in *other terms* and show compliance with it as thus described.[1] Where it set up the existence of a *custom*, by which it was competent to the defendants to remove the officer *at will*, it was necessary that the existence of the custom should be positively alleged.[2]

§ 834. **Return may Show any Number of Causes.** — The return to a *mandamus*, sued out to admit a person to a corporate franchise, may show any number of causes upon which his amotion is justified, provided they be *consistent* with each other.[3] But where the matters returned are *repugnant*, the rule is otherwise, because then the court cannot tell what to believe.[4] So, where the defendants first returned an election, and then returned circumstances avoiding it, and finally returned that there was no election at all, a peremptory *mandamus* was granted.[5] But where several independent causes are returned, and although not inconsistent with each other, some are good and others are bad, the court may, it has been held, quash the bad and send the good to the prosecutor to plead to or traverse the rest.[6] So, where the return was that the party was not duly elected, and also that there was a *custom* to remove *ad libitum*, according to which he was removed, it was held a good return; for he might be in possession *de facto*, and either ground would justify his removal.[7] Where it was returned that B. was not a burgess;

[1] Rex *v.* Bailiffs of Malden, 2 Salk. 431; *s. c.* 1 Ld. Raym. 481.

[2] Thus, to a *mandamus* to restore J. S., to be one of the common council-house of the corporation of Coventry, it was returned that they were an ancient corporation, and that the king, by his letters-patent, reciting their customs, amongst which was that of electing persons to be of the common council-house, and removing them *ad libitum*, did grant and permit all their liberties, customs, etc., and that they, by force of the said custom, time out of mind, used *et secundum forman literarum patentium prædict.*, did remove him, — it was held that this return was naught, "because it did not appear that the corporation had any such power, but only by the recital; whereas they should have returned they had such a power positively." Rex *v.* Mayor of Coventry, 2 Salk. 430; *s. c.* 1 Ld. Raym. 391.

[3] Wright *v.* Fawcett, 4 Burr. 2041, 2045; Reg. *v.* Norwich, 2 Salk. 436.

[4] Rex *v.* Mayor of Cambridge, 2 T. R. 456, 461.

[5] Reg. *v.* Norwich, 2 Salk. 436; *s. c.* 2 Ld. Raym. 1244; Holt, 444.

[6] Rex *v.* Mayor of Cambridge, 2 T. R. 456; Compare Rex *v.* Mayor of York, 5 T. R. 66.

[7] Rex *v.* Church Wardens, Cowp. 413.

that he was not eligible to the office of common councilman; and that he was not elected; — it was held that these were not inconsistent returns.[1] So, where it was returned, first, that the person was not duly elected sexton; and secondly, that there was a custom to remove and that he was removed pursuant to such custom, — these were not inconsistent returns, because the person might have been elected in fact, and afterwards removed.[2] "Where," said Lord Mansfield, "is the repugnancy in this return? If he was not duly elected, he certainly has no right to be restored. But whether duly elected or not, they show a right by custom to remove him at pleasure, and they have done so. There is no repugnancy in saying that he was *not duly* elected, but that, being *in fact* elected, they, according to an ancient custom, removed him from the office. In either case they were equally entitled to exercise that right." [3] But where the object of the *mandamus* was to compel the defendants to certify the election of a person as recorder of York, which election was stated in the writ to have taken place on the 15th of January, and it was returned that the corporation were not then duly assembled, and also that afterwards, to wit, on the 15th day of January, 1789, the corporation did assemble, and elected another person, — it was held that this was an inconsistent return. The day was material, and therefore the laying it under a *videlicet* did not signify.[4]

§ 835. When not Necessary to Aver Power of Removal. — It was held that, in a return to a *mandamus* to restore a corporator to his membership, where it was stated that the party was removed by the corporate body at large, it was not necessary to aver that the power of removal was vested in them, because that was *incidental* to them, unless it had been given by their charter, or by some by-law or regulation, to a select portion of them.[5] "It is one of the first principles of pleading," said Buller, J., "that you have only occasion to state facts; which must be done, for the purpose of informing the court, whose duty it is to

[1] Rex *v.* Mayor of Cambridge, 2 T. R. 456.

[2] Rex *v.* Church Wardens, Cowp. 413.

[3] Rex *v.* Church Wardens, Cowp. 413, 414.

[4] Rex *v.* Mayor of York, 5 T. R. 66.

[5] Rex *v.* Mayor of Lyme Regis, Doug. 144.

declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it. It is now settled to be matter of law, that, *prima facie*, the power of amotion is in the body at large. Being matter of law, it is not traversable. But the present prosecutor may now reply, that the power is not according to the general law in this case, but in a select body, which may then be tried by a jury. If the return be certain on the face of it, *that* is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. We must consider the charter as truly stated, because nothing appears to contradict it; and, if so, the law says, that, by such a charter, the corporation at large have the power of amotion. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. If the power of amotion is, in this place, in a select part, and the present return is bad on that account, I am clear that an action will lie." [1]

§ 836. Instances of Good Returns in such Cases. — It is sufficient, in the return to a *mandamus* which sets up a corporate act, that it be averred that the act was done *by the corporation*, naming it; it is not necessary to be so explicit as to state that the act was done by the *major part* of the corporation.[2] - - - - The power of holding a corporate meeting for amotion being incident to the power of amotion, it need not be set out in a return to a *mandamus*.[3] - - - - The nice distinctions taken concerning the return to the writ of *mandamus*, as thus used, are well illustrated by a case where it was returned *nunquam fuit debite electus* — that he never was duly elected. The return was held to be good, though it would have been better to have made a general return, namely, *nunquam fuit electus in officium*, without saying *debite*.[4] - - - -

[1] *Ibid.*, 154.

[2] Thus, where a *mandamus* was prayed for to restore an alderman who had been turned out of his place for refusing payment of the tax assessed by the burgesses and aldermen in his presence, under a by-law, it was objected that the assessment was not said to have been made by the major part; but the court said that it would be intended to have been made by them all. Rex *v.* Town of Rippon, 2 Keb. 15.

[3] Rex *v.* Mayor &c. of Lyme Regis, 1 Dougl. 149.

[4] Lambert's Case, Carth. 170. "On *mandamus* to restore him to the town clerk's office, they retorn'd, that he was never *debite admissus*, and so they could not restore, which *per*

It is of course a sufficient return to a *mandamus* to restore an officer of a corporation that he has *never been removed* by the corporation, or by any of the corporation.[1] - - - It has been laid down that a return by a corporation, in its *right name*, to a writ of *mandamus* directed to it in a *wrong name*, is well enough.[2]

§ **837. Sufficient if Made by Proper Officer until Falsified.** — Where the *mandamus* was directed to the mayor, bailiffs, and burgesses of a municipal corporation, and the return was made by the mayor alone, and a motion was made to stay the filing of it, upon suggestion that it had been made by the mayor and a minor part of the bailiffs and burgesses, and against the consent of the greater number, who would have obeyed the writ, wherefore the greater number prayed that they might falsify this return and put in another, — the motion was overruled, Lord Eldon, C. J., saying: "Where a writ is directed to a single officer, as sheriff, and a return is made by a stranger, without any privity, he may any time that term wherein the writ is returned, come in and disavow it, but not after the term. But in this case, where the writ is directed to several, and the mayor, who is the most principal and proper person, returns and brings in the writ, it is not fit that we should examine, upon affidavit, whether there was the consent of the majority. We will take it, and leave you to punish the mayor for this misdemeanor, if he be guilty; for it is a great crime which will not only merit a heavy fine, but a peremptory *mandamus* will be granted, if the return be falsified. If they are all equally parties, this might be another case." The return was accordingly filed, and at the same time leave was given to file an infor-

curiam is valid ground of action upon the case [for a false return]; *contra* if it had been *nunquam debito modo admissus*, by Twisden. But the rest agreed it also well enough." Rex *v.* Hereford, 1 Keb. 655. In one case, to a *mandamus* to restore an alderman, it was returned "that, contrary to his oath, *spoliavit et dilaceravit quædam recorda* of such a court, which was after presented, without showing the presentment; which, *per curiam*, is well enough on *mandamus*, in that the record being spoiled, the town cannot certainly show it. Also being said *contra officium et juramentum*, it shall be intended in a retorn to be voluntary, and the retorn was confirmed; although it's not said, that the defendant was a resident within the precinct of the leet, to which he was summoned." Town of Wigon *v.* Pilkington, 1 Keb. 597.

[1] Rex *v.* Colchester, 2 Keb. 188.

[2] Rex *v.* Mills, 1 Keb. 623.

mation against the mayor.[1] In another case, "the *mandamus* was granted to the mayor, etc., of Norwich. It was moved that the sense of the mayor differed from the majority of the corporation, and that he would execute the writ, whereas the corporation were for returning an excuse, etc., and they prayed that the mayor might be ordered to deliver the writ to the rest of the corporation. *Sed non allocatur;* for he is the head and principal, and take your course against him."[2]

§ 838. Whether the Return Should be Under Corporate Seal.—It seems to have been held sufficient, in the case of a *mandamus* to the mayor and burgesses of an incorporated borough, for the return to be under the *hand* and *seal* of the mayor, without being under the common seal of the corporation.[3] "The seal," said Lord Holt, C. J., referring to the common seal of the corporation, "is not necessary to a record. In Bagg's Case the mayor did subscribe. It is directed to Dr. Gower by name."[4] In another case the corporation made a return to a *mandamus*, which was neither signed nor under the common seal. It was moved that it might be signed. Lord Holt, C. J., said: "It is usual for the mayor to sign it, though not legally necessary; therefore let him sign it."[5] In another case of the same nature, there was neither hand nor seal to the return. Lord Holt, C. J., said: "It needs not; it is received as a record; it hath been so ordered, but never by me; I know when it began, and when they began to put the common seal to it, which was not necessary. Before the statute of York the sheriff needed not to have put his name. You may bring an action for the false return, either against the corporation or against the particular person that procured it."[6]

§ 839. Variance between Writ and Return.—An instance of the absurd strictness to which pleadings were carried in cases of *manda-*

[1] Rex *v.* Mayor of Abbingdon, 2 Salk. 431; *s. c.* Carth. 499; Cases B. R. 401.

[2] Rex *v.* Mayor of Norwich, 2 Salk. 432; *s. c.* Holt, 444.

[3] Powell *v.* Price, Comb. 41.

[4] Rex *v.* St. John's College, Comb. 279.

[5] Rex *v.* Mayor of Colchester, Comb. 324.

[6] Lidleston *v.* Mayor of Exeter, Comb. 422.

mus, before the statute of 9 Anne,[1] will be found in a case of this kind, which arose in the Queen's Bench in the fourth year of Anne. At that time legal proceedings were recorded in the Latin language. The writ was intended to be directed to the bailiffs, burgesses, and commonalty of the town of Ipswich. It was directed, *ballivis, burgensibus, et communitat. villæ de Gippo.* The return was, *responsio ballivorum, burgensium, et commun. villæ de Gipwico, sive burgi Gipwici patet, etc nos ballivi*, etc., return the constitution so and so. After showing the ground upon which they had turned Sergeant Whiteacre out of his office, they concluded thus: "*Et ulterius certificamus quod inhabitantes villæ prædict. nunquam nuncupati fuerunt per nomen ballivorum, burgens., et com. villæ de Gippo, etc.*" The report goes on to recite: "This case pended long, and was often argued upon several objections; and first the chief justice held, that Gippus and Gipwicus were different names, so that the writ was misdirected; but then they should have returned the special matter accordingly, and relied upon it; for now they had admitted themselves to be the corporation to whom the writ was directed, by returning *executio*, etc. And a corporation may have several names;[2] and here, it being started, whether a corporation should lose its old name by a new charter[3] the chief justice said, it would, where the new charter altered the very constitution in the integral parts of it; as if bailiffs and burgesses are made mayor and aldermen, or mayor or burgesses, or where an abbott and convent are translated into a dean and chapter; but if the bailiffs and burgesses *villæ de Gippo* accept a charter, constituting them bailiffs and burgesses *villæ de Gipwici*, and giving them further privileges, and that they shall be so called; this is a new name only, for the old corporation remains in the integral parts of it. Powell (a justice), being not satisfied in the first point, it finished without resolution, by discovering that Gippo in the latter end of the return was with a dash, and in the writ without, so that then it was not *ad idem.*" The court, after considering various other objections, "ordered a peremptory *mandamus*, and that it should be directed according to the first writ, viz., *villæ de Gippo*, and must not differ." [4]

§ 840. Other Points of Practice in Proceedings by Mandamus.—In such a proceeding, *objections* to a writ of *mandamus* which are merely *technical*, must be taken *in limine* on a motion to quash, and cannot prevail after the return.[5] The end of the

[1] *Ante*, § 833.

[2] *Ante*, § 291, *et seq.*

[3] *Ante* § 289.

[4] Reg. *v* Bailiffs of Ipswich, 2 Salk. 434; *s. c.* 2 Ld. Raym. 1233.

[5] Fuller *v.* Academic School, 6

summons is that the party against whom the writ is directed may be heard for himself; and therefore, as in other cases where he has voluntarily *appeared* and has been heard upon the merits of the controversy, the want of a summons is no objection.[1] An action will lie for a *suppressio veri*, in a return to a *mandamus*, as well as for an *allegatio falsi*.[2]

§ 841. Principles upon Which the Judicial Courts Review Sentences of Amotion. — As already stated, and as hereafter more fully stated when treating of the *expulsion* of members of corporations and societies, the judicial courts do not, when applied to to reinstate the member or to restrain the corporation, or society, or its managers, from interfering with his rights of membership, assume to retry the merits or to rejudge what has passed *in rem judicatam* before the corporate judicatory.[3] This was the rule on which the Supreme Judicial Court of Massachusetts proceeded, when reviewing the sentence of amotion under a statutory appeal, given to the court from the judgment of the visitors of an educational corporation. The statutes of that corporation (the Andover Theological Seminary) gave an appeal to visitors from acts of the trustees, and made it the duty of the visitors to hear the whole case anew. The trustees having removed a professor, he appealed to the visitors, by whom the removal was confirmed; and he then, under a statute of the State, appealed to the Supreme Court. The court held, that any *irregularity* or *injustice* in the proceedings before the trustees, could not be taken into consideration; their sentence being vacated by the appeal to the visitors.[4] The court also intimated that if a party would impeach the judgment of the visitors on the ground of partiality or corruption, unlawful admission or rejection of evidence, or any other decision not apparent on the record, he should make seasonable demand that the evidence be reduced to writing, so that it may come up to the court with the record; or tender a bill of exceptions.[5] It was also ruled that the court has

Conn. 532, 544; Rex *v.* Mayor of York, 5 T. R. 66, 74.

[1] Rex *v.* Mayor of Wilton, 2 Salk. 428.

[2] Rex *v.* Mayor of Lyme Regis, Doug. 144.

[3] *Ante*, § 825; *post*, § 914.

[4] Murdock's Appeal, 7 Pick. Mass. 303, 327.

[5] *Ibid.*

no authority, on such appeal, to examine the evidence by way of a rehearing, but must determine the questions upon the record of the visitors; and therefore merely incorrect judgment of the visitors was not a ground for the interference of the court.[1] The court is restricted to the decision of the questions whether the visitors have acted contrary to the statutes, and whether they have exceeded their jurisdiction.[2] The court would not reverse the decision of such a board of visitors removing such an officer for cause, on the ground that they had refused to conduct the trial with *open doors*, or to admit persons not engaged in the proceeding, although their course in so doing may have been unwise; but the reviewing court would *presume* that they had satisfactory reasons for conducting the trial in this way; and although the tenure of such an officer was during good behavior, yet it was subject to forfeiture upon the honest judgment of the proper tribunal that the officer had ceased to behave well, in the sense attached to that phrase by the founders of the charity.[3] In Connecticut, the ruling of the court, in a leading case, was that the courts of justice had a supervising jurisdiction over the proceedings of the trustees of a charitable corporation, independent of any power of visitation; and that they would exercise this jurisdiction by *mandamus*, to the end of reinstating an officer removed by the other officers, where the *causes assigned* for the removal were *insufficient*.[4] The modern English doctrine is that where it appears from the showing of an officer that the corporation justly though irregularly removed him from his office, a *mandamus* to restore will not be granted.[5] Though a corporation may have, by statute, a power to remove an officer holding a freehold office, yet the court of Queen's Bench will interfere if the power is exercised in an *unlawful manner;* but if exercised in a lawful manner, the fact that it was not *wisely* or *discreetly* put in force in the particular case, will not induce the

[1] *Ibid.*

[2] *Ibid.;* S. P., Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244.

[3] Murdock's Appeal, 7 Pick. (Mass.) 303.

[4] Fuller *v.* Plainfield Academic School, 6 Conn. 532.

[5] Rex *v.* Mayor &c. of Axbridge, Cowp. 523; Rex *v.* Mayor &c. of London, 2 T. R. 177; Rex *v.* Mayor &c. of Bristol, 1 Dowl. & R. 389; *sub nom.* Rex *v.* Griffiths, 5 Barn. & Ald. 731.

court to interfere. Therefore, where, in a proceeding by a corporation to remove an officer upon an accusation of inability or neglect of duty, there has been such evidence given as, in an ordinary trial, would justify the judge in *leaving it to the jury*, as matter of fact, whether the accusation was made out, the court will not interfere with the decision arrived at by the corporation.[1]

[1] Osgood *v.* Nelson, L. R. 5 H. L. 636.

CHAPTER XVII.

EXPULSION OF MEMBERS.

ARTICLE I. POWER TO EXPEL: GROUNDS OF EXPULSION.

§ 846. **Preliminary Observations — Distinctions.** — The subject of which it is intended to treat in this chapter relates exclusively to corporations and associations not having a joint stock. It is assumed that no such body, having a joint stock in which its members are severally interested as proprietors, can deprive them of their property rights by expelling them from the corporation or society unless such power has been expressly conferred by the charter.[1] Another distinction, which must be taken in respect of this question, is the distinction between what is called *disfranchisement* and what is called *amotion*, in the books of the common law. Disfranchisement is the term applied to the expulsion of a *member* of a corporation, whereby his franchise, or freedom, to use the language of old books, employed chiefly with reference to municipal corporations created by royal charter or existing by prescription,— was taken away. The term *amotion* is applied merely to the removal of an *officer* of a corporation, and most of the old law upon this subject is an outgrowth of the ancient common-law principle that an office was property.[2] Another distinction, which must be kept in mind in respect of this question, is the distinction between rights in a *corporation* and rights in an *unincorporated society*. In the former case the member has rights granted by the legislature, which cannot be taken

[1] Ang. & A. Corp., § 410; Woodward, C. J., in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 117; Pulford *v.* Fire Dep't of Detroit, 31 Mich. 458, 465. The statute of Wisconsin (Wis. Rev. St. 1878, § 1772), requiring that the articles of association by persons desiring to form a corporation shall state the methods and conditions upon which members shall be accepted, discharged, or expelled, does not apply to a *stock* corporation. Edgerton Tobacco Manf. Co. *v.* Croft, 69 Wis. 256.

[2] See as to these distinctions Bagg's Case, 11 Co. Rep. 93; Earle's Case, Carthew, 173; White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162, 192; *s. c.* 2 Daly (N. Y.), 329, 357; Com. *v.* St. Patrick's Benevolent Society, 2 Binn. (Pa.) 441; *s. c.* 4 Am. Dec. 453; Fuller *v.* Trustees, 6 Conn. 532; People *v.* Medical Society, 24 Barb. (N. Y.) 570; Evans *v.* Philadelphia Club, 50 Pa. St. 107; Willcock Corp. 270.

away by the society unless authorized by the governing statute or charter, or unless, under the principles of the common law, in the extreme cases hereafter spoken of. But in the latter case the member has no rights of a higher dignity than those springing out of a voluntary contract between himself and his fellow members. Such contracts are upheld when not contrary to law or to public policy, and the member may thereby voluntarily subject himself to summary expulsion for causes and in modes which would not be justified in the case of a corporation existing under a charter or act of the legislature.[1]

[1] See as to this distinction the discussions in White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162, 192; *s. c.* 2 Daly (N. Y.), 329, 358; Innes *v.* Wylie, 1 Car. & K. 257, 262; Brancker *v.* Roberts, 7 Jur. (N. S.) 1185; Hopkins *v.* Exeter, L. R. 5 Eq. 63; Blisset *v.* Daniel, 10 Hare, 493. This distinction has been learnedly pointed out by that exceptionally able judge, Charles F. Daly, in a well considered case, in which he said: "A member of a corporation, whether it be municipal, eleemosynary or private, is in the enjoyment of a *franchise* the right to which is not derived from the body, but is created by statute or exists by prescription, and therefore cannot be taken away by the act of the corporation, except, as I have said, in certain extreme cases. As it is a right conferred by statute, or derived from immemorial custom which implies the existence of a grant, it can neither be taken away by the act of the corporation, nor withheld by the act of the corporation, from any one eligible to the enjoyment of it. . . . But in an unincorporated voluntary association, like the one now under consideration [an exchange called the Open Board of Brokers], the privilege of membership is not given by statute, or derived through prescription, as in a corporation, but is created and conferred by the organization itself. It is not a franchise — a franchise being a particular privilege vested in individuals, which is confeerrd by a grant from a sovereign or government [citing Finch Sum. C. L. 164; 3 Kent Com. 458]; while, on the contrary, the privilege of membership in a voluntary association is derived exclusively from the body that bestows it, and may be conferred or withheld at its pleasure. The law cannot compel such an organization to admit an individual to a membership, as may be done in the case of a corporation, nor can it interfere to restore a member who has been deprived of the privilege for not complying with the conditions upon which the enjoyment of it was made to depend. A member of a body of this description, has, as such, undoubtedly rights which the law will protect; but they do not rest upon the same ground, and are by no means coextensive with the franchise enjoyed by a member of a corporation. They depend upon the nature of the organization, upon the object for which it was formed, and upon the rules, regulations, constitution or by-laws which are explanatory of its purpose, and which the body has adopted for its government. Individuals who form themselves into a voluntary association for a common object may agree to be governed by such rules as they think proper to

§ 847. Power of Expulsion Incident to Corporation. — The power to disfranchise a member for sufficient cause, as hereafter stated,[1] existed and exists at common law, as an incident to every corporation, except those having a joint stock.[2] The inherent power of a corporation other than a joint-stock corporation to expel a member for sufficient cause rests on substantially the same ground as its powers to amove an officer,[3] and the decisions supporting the power in the two cases are often cited interchangeably. Reasoning on this subject, it has been said: "There is a

adopt, if there is nothing in them in conflict with the law of the land; and those who become members of the body are presumed to know them — to have assented to them — and they are bound by them. [Citing Innes *v.* Wylie, 1 Car. & K. 262; Brancker *v.* Roberts, 7 Jur. (N. S.) 1185; Hopkinson *v.* Exeter, L. R. 5 Eq. 63.] Such an organization may prescribe the conditions upon which persons will be admitted to membership, as well as the conditions upon which the continuation of membership will depend; and where they have no regulation upon the subject, they may expel a member by a vote of the majority, if he has been notified of the charge against him, and afforded an opportunity of being heard in his defense. [Citing Innes *v.* Wylie, *supra.*] Voluntary bodies of this kind will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where a member is expelled in conformity with the rules, and the proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere." White *v.* Brownell, 4 Abb. Pr. (N. Y.) 162,192–4 *s. c.* 2 Daly (N. Y.), 329, 358; citing to the last point Com. *v.* Pike Beneficial Society, 8 Watts & S. (Pa.) 250.

[1] *Post,* § 854.

[2] Rex. *v.* Richardson, 1 Burr. 517; Fawcett *v.* Charles, 13 Wend. (N. Y.) 473; Com. *v.* Guardian of the Poor, 6 Serg. & R. (Pa.) 469, 473, per Duncan, J.; Smith *v.* Smith, 3 Desau. (S. C.) 557, 581. To this extent Bagg's Case (11 Co. Rep. 93) is overruled by the later English decisions above cited. Bagg's Case, although discussing largely the power of *disfranchisement,* was really a case of *amotion,* the relator in the *mandamus* proceeding being one of the twelve burgesses of Plymouth. That the same principle applies to the amotion of an officer, is equally clear of doubt. Woodward, C. J., in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 117. It was also reasoned by the same learned judge in the same case that "The power of disfranchisement which does destroy the member's franchise, must, in general, be conferred by statute, and is never sustained as an incidental power, without statute grant, except in two cases: First, on conviction of the member in a court of justice of an infamous offense. And, second, where he has committed some act *against the society* which tends to its destruction or injury." Statement of doctrine by Woodward, C. J., at *nisi prius,* in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 117, affirmed by an equal division of the Supreme Court. *Ibid.* 127. Contrary to the doctrine of the text, see People *v.* New York Cotton Exchange, 8 Hun (N. Y.), 216; more fully stated, *post,* § 851.

[3] *Ante,* § 802.

tacit condition annexed to this franchise, which, if the member break, he may be disfranchised; and where the offense is merely against his duty as a corporator, he can be tried only for it by the corporation. Unless this power were incident to the corporation, offices might be forfeited for offenses, and yet there would be no means to carry the law into execution." [1]

§ 848. This Power Exercised by the Corporation — Not by the Directors. — The power of expelling a member from a *corporation* exists only in the society at large, unless the charter, governing statute, or some by-law thereby expressly authorized, vests this power in a smaller number, as in the board of directors, the trustees, or the managing committee.[2] The reason is, that it is the ordinary office of such managing boards or committees to conduct the *business* of the corporation, and not to determine matters touching its constituent character. But expulsions of members by the directors are, of course, upheld where there is a statute vesting this power in them;[3] and in the case of voluntary associations, where this power is vested in the board of managers or other judicatory, by the articles of association, which form a contract among the members.[4]

§ 849. By-laws Authorizing the Expulsion of Members. — It has been said: "When a corporation is duly organized, it has power to make by-laws and expel members, though the charter is silent upon the subject. If the power is expressly granted in general terms, it is conferred to enable the corporation to accomplish the object of its creation, and is limited to such objects or purposes." [5] Where the authority to expel a member of a corpora-

[1] Duncan, J., in Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 473.

[2] Hassler *v.* Philadelphia Musical Assoc., 14 Phila. (Pa.) 233; State *v.* Chamber of Commerce, 20 Wis. 63.

[3] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 686. The charter of the Chicago Board of Trade provided that the corporation "shall have the power to admit or expel such persons as they may see fit, in the manner prescribed by the rules, regulations, and by-laws thereof." A rule providing for expulsion by the board of directors was held valid on the ground that it was not essential that the power should be exercised by the body of the corporators. Pitcher *v.* Chicago Board of Trade, 121 Ill. 412; 13 N. E. Rep. 187; 11 West. Rep. 38; 2 R. & Corp. L. J. 89.

[4] Compare People *v.* New York Commercial Assn., 18 Abb. Pr. (N. Y.) 271.

[5] State ex rel. *v.* Chamber of Commerce, 20 Wis. 63, 71; reaffirmed in

tion is sought for in a by-law, certain prerequisites must exist. Unless the power to enact by-laws is, by the charter or governing statute or by immemorial usage, conferred on the directors, trustees, or other body smaller than the corporation at large, a by-law in order to be valid, must be enacted by the *constituent* body.[1] Moreover, the validity of such by-laws depends upon the well known rule that they must be *reasonable*.[2] They must not be contrary to law, to good morals or to public policy.[3] They must not operate as *ex post facto* laws; [4] they must not authorize the expulsion of members for *trivial* or *minor offenses;* [5] they must not impose *excessive fines*, nor more than one fine for the same delinquency.[6] They may annex to their prohibitions reasonable *penalties*, in the form of pecuniary *fines;* [7] but such fines

Dickenson *v.* Chamber of Commerce, 29 Wis. 45; *s. c.* 9 Am. Rep. 544.

[1] *Post*, § 956; Carroll *v.* Mullanphy Savings Bank, 8 Mo. App. 249, 253; State Savings Asso. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642; Morton Gravel Road *v.* Wysong, 51 Ind. 4, 12; Union Bank *v.* Ridgley, 1 Harr. & G. (Md.) 324; Rex *v.* Westwood, 2 Dow & Cl. 21, 36. Charters and governing statutes exist in some cases conferring this power on the directors. Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; *post*, § 978. But where the power is not so conferred, it is at common law *incident to the corporation* (Rex *v.* Westwood, 2 Dow. & Cl. 21, 36), and not to the directors.

[2] That corporate by-laws and ordinances will be set aside by the judicial courts when deemed unreasonable, see *post*, § 1021; Morris &c. R. Co. *v.* Ayres, 29 N. J. L. 393; State *v.* Overton, 24 N. J. L. 435; *s. c.* 61 Am. Dec. 671; Neier *v.* Missouri Pacific R. Co., 12 Mo. App. 25; Merz *v.* Missouri Pacific R. Co., 14 Mo. App. 459; St. Louis *v.* Weber, 44 Mo. 547; St. Louis *v.* St. Louis R. Co., 14 Mo. App. 221; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; *s. c.* 100 Am. Dec. 388; cited and approved in Spurlock *v.* Pacific R. Co., 61 Mo. 326; Beronjohn *v.* Mobile, 27 Ala. 58. A by-law authorizing the expulsion of a member of a mercantile body for dishonest conduct as a merchant is not unreasonable. People *v.* New York Commercial Asso., 18 Abb. Pr. (N. Y.) 271; Hurst *v.* New York Produce Exchange, 100 N. Y. 605, mem. *s. c.* in full, 1 Cent. Rep. 260. Reasonableness of a by-law prohibiting members of an exchange from gathering and trading in public places in the vicinity of the exchange room before or after exchange hours: State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 683.

[3] Sayre *v.* Louisville &c. Asso., 1 Duv. (Ky.) 143; *s. c.* 85 Am. Dec. 613; *post*, § 1010.

[4] People *v.* Fire Department, 31 Mich. 458, 465; *post*, § 1019.

[5] Woodward, C. J., in Evans *v.* Philadelphia Club, 50 Pa. St. 107, 117; Com. *v.* St. Patrick's Benevolent Society, 2 Binn. 441; *s. c.* 4 Am. Dec. 453.

[6] Hagerman *v.* Ohio &c. Asso., 25 Oh. St. 186; Lynn *v.* Freemansburg &c. Asso., 117 Pa. St. 1; *s. c.* 2 Am. St. Rep. 639. See also Ocmulgee &c. Asso. *v.* Thomson, 52 Ga. 427; Endlich Build. Asso., § 413.

[7] Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124; *s. c.* 43 Am. Dec. 457; *post*, § 1036.

must be *certain;*[1] though the modern doctrine is, contrary to the cases just cited, that it is sufficiently certain if the by-law names the highest limit of the fine, leaving to the corporation the power of mitigation.[2] They cannot be enforced by a forfeiture of goods, for forfeitures are against *magna charta;*[3] nor by *imprisonment*, unless authorized by charter, statute or custom according to old views;[4] and it would seem not, according to modern conceptions, except in the cases of the by-laws or ordinances of municipal corporations.

§ 850. Illustrations of Good and Bad By-Laws Providing for the Expulsion of Members.— A benevolent society incorporated for the purpose of providing a fund for sick and indigent members, the articles of association of which do not fix any qualification in respect of *religious opinions*, cannot make a by-law which will authorize the expulsion of members on grounds of religious belief.[5] - - - - A volunteer fire company, upon the creation of a paid fire department, ceased to run to fires, and converted its effects into cash, and leased its engine house. Some months afterwards it amended its by-laws, *changing the rate of dues* from twelve and one-half cents to two dollars a month. A member, did not assent to the increase of dues, and did not pay them, for which reason his name was erased from the books. In a proceeding by *mandamus* to restore him, it was held that the amendment to the by-laws was *unreasonable*, and that, upon a dissolution of the company

1 Ang. & A Corp., § 360; Wood *v.* Searle, J. Bridg. 141; *s. c.* 3 Leon. 8; Mobile *v.* Yuille, 3 Ala. 137; Master Stevedore Asso. *v.* Walsh, 2 Daly, 1, 14; *post*, § 1010.

2 Piper *v.* Chappell, 14 Mees. & W. 624 (overruling to this extent Wood *v.* Searle, *supra*); Huntsville *v.* Phelps, 27 Ala. 58 (overruling to this extent Mobile *v.* Yuille, 3 Ala. 137).

3 Master Stevedore Association *v.* Walsh, 2 Daly (N. Y.), 1, 14. See Bosworth *v.* Bergen, 7 Mod. 459; *s. c.* Lutw. 1324; Kirk *v.* Nowill, 1 T. R. 118. See in illustration of the text, Hart *v.* Mayor of Albany, 9 Wend. (N. Y.) 571. In Re Long Island R. Co., 19 Wend. (N. Y.) 37; *s. c.* 32 Am. Dec. 429, it was held that a by-law was void which forfeited the shares of the members in a joint-stock company for non-payment of calls, such measure not being authorized by the legislature. But, of course, this holding has no application to the numerous cases where such a power or forfeiture is conferred by charter or statute.

4 See Chamberlain of London's Case, 5 Co. Rep. 63b, where it was held that the City of London might imprison for a breach of its by-laws; also City of London's Case, 8 Co. Rep. 241, 253, where a similar doctrine is laid down. Compare Rex *v.* Newdigate, Comb. 10.

5 People *v.* St. Franciscus Benevolent Soc., 24 How. Pr. (N. Y.) 216. And see People *v.* Farrington, 22 *Id.* 294.

and a distribution of its property among its members, the relator was entitled to his share as a member.[1] - - - - By-laws which prescribe a trial of the members of the corporation for any delinquencies before a select number of members appointed by the president, and presided over by him, without the right of appeal, and confine the evidence to such as may be brought by members only, and prescribe that members shall be dropped without trial, if fines imposed by said by-laws are not paid, are not so unreasonable as to be declared null and void by a court of equity, and the officers restrained from enforcing them.[2] - - - - The defendant was a member of a corporation, created under the laws of New York,[3] membership in which was restricted to the members of certain "local assemblies" of the "*Knights of Labor*" under the jurisdiction of "District Assembly 49." Section three of the statute referred to provided for the termination of membership in the corporation by death, voluntary withdrawal, and expulsion. It was held, that a by-law which declared that the removal of a local assembly from the jurisdiction of District Assembly 49 should be equivalent to a voluntary withdrawal of all membership in the corporation, was in conflict with the statute, and that the removal for insubordination, in which defendant took no part, from the jurisdiction of District Assembly 49, of the local assembly of which he was a member, would not deprive him of his membership on that ground.[4] - - - -

§ 851. Validity of By-Laws Providing for Expulsion for the Non-fulfillment of Commercial Contracts. — An incorporated merchant's exchange or chamber of commerce empowered by its charter to expel its members in the manner to be prescribed by its rules and by-laws, may make a by-law providing for the expulsion of a member for the non-fulfillment of any contract, whether written or verbal, and such a by-law will not be held unreasonable because it authorizes the expulsion of a member for refusing to perform a contract which is void by the statute of frauds, since there is no reason founded in morality or commercial integrity why such a contract should not be performed, nor will it be held unreasonable in its application to a contract such as passes under the ordinary name of an "option deal."[5] It has been reasoned upon this question that "one of the principal objects of the corporation undoubtedly is 'to establish a high moral standard in conducting busi-

[1] Hibernia Fire Engine Co. *v.* Commonwealth, 93 Pa. St. 264. Compare Diligent Fire Co. *v.* Commonwealth, 75 Pa. St. 291.

[2] Hussey *v.* Gallagher, 61 Ga. 86.

[3] Laws N. Y. 1875, c. 267.

[4] New York Protective Ass'n *v.* McGrath, 5 N. Y. Supp. 8.

[5] Dickenson *v.* Chamber of Commerce, 29 Wis. 45; *s. c.* 9 Am. Rep. 544.

ness transactions, and to exercise somewhat of a control over those who belonged to it in their trade with each other, and with strangers. It reaches a little beyond the precise legal rights of its members in their business conduct, subjecting them to a supervisory care, so far as fair dealing is concerned, to which they would not be ordinarily amenable in any tribunal known to the land.' "[1] Contrary to the generally understood rule of the common law, we find an opinion in the Supreme Court of New York by Brady, J.,[2] which proceeds upon the view that the doctrine in regard to forfeitures, whereby forfeitures are not favored, applies to the question under consideration, so as to result in the conclusion that the power to forfeit the seat of a member does not exist, unless it is conferred upon the corporation or upon the judicatory of the corporation which attempts to make the forfeiture, in express terms. The case was that of a member of the New York Cotton Exchange, and the learned judge said: "There is neither in the charter of the appellants, nor the by-laws, however, any express authority to consider and determine who is the owner of a right of membership, which is in dispute. Whatever may be their power over matters directly connected with the business which prompted their organization, or with the adjustment of controversies between its members, or the establishment of just and equitable principles in the cotton trade, or acquired by voluntary submission to them or their committees under the charter and by-laws, there is no express authority conferred upon them to pass upon the title to a seat among them; nor is there anything in the by-laws to which our attention has been called authorizing it incidentally or by implication. They could not, therefore, usurp the power absolutely, to pass upon the relator's claim, and when he resorted to the courts to prevent them from disposing of his property, he was not only not guilty of improper conduct, but asserting a right secured to him by the fundamental law of the land. It may be that a member would be bound by the decision of the appellants in specified cases, which being properly the subject of a reasonable by-law, duly authorized, would be recognized as lawful within the principles governing them. The appellant, however, on such subjects, can take nothing by implication. Forfeitures depend upon clear and explicit language, and are even looked upon with disfavor. Expulsions from a corporation should not be accomplished by hurried and incomplete investigations. A member of a corporation may so hedge himself in by agreement as to yield the protection which one seeks in

[1] *Ibid.*, quoting from People ex rel. *v.* New York Commercial Asso., 18 Abb. Pr. (N. Y.) 271, 279. See also People *v.* Chicago Board of Trade, 40 Ill. 112.

[2] Davis, P. J., and Daniels, J., concurring in the result.

the ordinary affairs of life, and enlarge the authority that may be used against him, but when it is said he has done so, it should appear beyond all reasonable doubt. The presumption should be against the power to expel except for the causes recognized by the adjudged cases, because it is in the nature of a forfeiture, which the law does not favor. The right to appeal to another tribunal, if to be foreclosed, should be so by contract or agreement, not by mere construction of language employed in a by-law, or by implication from something contained in it; when this power is assumed, and upon either of these elements, and there is any doubt of its existence, it should be rejected in the administration of the law. This seems to be a just doctrine. The power should be unquestionable."[1] The by-laws of the New York Produce Exchange, creating an "arbitration committee" to hear and decide controversies between members, etc., and a "complaint committee" to entertain accusations against any member of willful violation of the charter or by-laws, of fraudulent breach of contract, of conduct inconsistent with just and equitable principles of trade, or of other misconduct, and authorizing the further proceedings of summoning and hearing a member so accused, before the complaint committee and again before the board of managers and, if the accusation is finally substantiated, of suspending or expelling him by a two-thirds vote of the board, have been held just and reasonable, and fully authorized by the charter.[2]

§ 852. By-law Prohibiting Members from Gathering in Public Places to Buy and Sell "Futures" outside the Exchange Room. — The Supreme Court of Wisconsin has upheld the following by-law of the Milwaukee Chamber of Commerce: "Members of the Chamber of Commerce are hereby prohibited from gathering in any public place, in the vicinity of the exchange room, and forming a market for the purpose of making any trade or contract for the future delivery of grain or provisions, before the time fixed for opening the exchange room for general trading, or after the time fixed for closing the same daily; and any member who shall make any trade or contract in the

[1] People *v.* New York Cotton Exchange, 8 Hun (N. Y.), 216, 219.

[2] Hurst *v.* New York Produce Exchange, 100 N. Y. 605, mem.; *s.c.* in full, 1 Central Rep. 260. This case reversed an order of the New York Common Pleas at general term affirming the orders of the special term granting an injunction. In the Court of Appeals three judges (Danforth, Rapallo and Finch, JJ.) dissented. As the Common Pleas is composed of three judges, it would appear that a minority succeeded in reversing an aggregate majority of judges on the question here decided, and that the case is therefore not of the best authority.

manner herein prohibited, shall be deemed to have violated this rule, and he may, therefor, be fined by the president in a sum not exceeding $5.00 for each and every such offense, and shall be liable to such additional discipline as the board of directors may determine; and any member refusing or neglecting to pay any such fine shall be suspended by the board of directors from all privileges of the association during the time that such fine shall remain unpaid." The court regarded the rule as a mere police regulation, enacted for the purpose of affording the members of the chamber free and convenient ingress to and egress from the chamber and to prevent confusion and disturbance in the public places near its exchange room, which might result from the unlimited right of the members to trade in those places. They therefore regarded it as proper for the good government of the chamber, and did not see that it imposed an unlawful restraint upon trade, or that it was unreasonable or unnecessary. But the court saw in it another ground on which it might be upheld: "It may be that experience had shown that the unrestricted right of the members to form a market at the time and in the places specified in the rule, for the purpose of making the class of contracts therein mentioned, tended to promote irregular transactions by persons not members of the chamber and not amenable to its rules." The court further observed that if it was true as the relator had given evidence tending to show, that nearly all of the time contracts mentioned in the rule were wagering or gambling contracts, and therefore void, — "it would be difficult to hold that a rule which operates as a restraint upon the making of *such contracts* is an unlawful restraint upon trade. In that case, if it is a restraint, the rule and the statute are in entire harmony."[1] It was further held that the above by-law was not void for uncertainty in not defining what was meant by "a public place in the vicinity of the exchange room" or what acts should constitute "forming a market" there.[2]

§ 853. By-Laws when not Enforcible by Forfeiture of Membership.—Unless authority to this end is granted by the legislature, a corporation cannot establish a by-law and annex thereto the sanction of a forfeiture of the membership of the members who violate it. "There can be no power to impose forfeitures unless granted by clear legislative enactment. No such power is consistent with common law or ancient right, and it cannot be obtained from anything but the sovereignty. The

[1] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 683, 686.

[2] *Ibid.* 687.

only implied means for the enforcement of corporate charges and penalties is by action. Summary means and methods unknown to the common law must be authorized by express authority. And it would not be reasonable to enforce a pecuniary obligation or penalty by means disproportionate to its importance. The law of the land is made the test for analogies in cases where it affords analogies." [1]

§ 854. **Grounds of Expulsion at Common Law: Bagg's Case.** — The leading case on this branch of the law is that of James Bagg,[2] decided in the reign of James the First, *anno* 1616. Bagg was one of the twelve chief burgesses of the borough of Plymouth, in England, and having been guilty of the most scandalous and disorderly speeches to the mayor and fellow burgesses was expelled; but the King's Bench, then presided over by Sir Edward Coke, restored him by *mandamus*. According to the report of Lord Coke, two questions were considered: 1. What were sufficient causes to disfranchise a citizen, freeman or burgess of any city or borough incorporate, and to discharge him of his freedom and liberty, and what not. 2. How and by whom, and in what manner such citizen or burgess shall be disfranchised. "As to the *first*, it was resolved that the cause of disfranchisement ought to be grounded upon an act which is against the duty of a citizen or burgess, and to the prejudice of the public good of the city or borough whereof he is a citizen or burgess, and against his oath which he took when he was sworn a freeman of the city or borough; for, although one shall not be charged in any judicial court for the breach of a general oath, which he took when he became officer, minister, citizen, burgess, &c., yet if the act which he doth be against the said duty and trust of his freedom and to the prejudice of the city or borough, and also against his oath, it enforces much the cause of his removal, and there is a condition in law *tacite* and annexed to his freedom or liberty; which if he breaks, he may be disfranchised; but words of contempt, or *contra bonos mores*,

[1] People *v.* Fire Department, 31 Mich. 458, 465, opinion of the court by Campbell, J. See also Matter of Long Island R. Co., 19 Wend. (N. Y.) 37; Westcott *v.* Minnesota Mining Co., 23 Mich. 145; People *v.* New York Cotton Exchange, 8 Hun (N. Y.), 216, 219; more fully stated in the preceding section.

[2] Bagg's Case, 11 Co. Rep. 93.

although they be against the chief officer, or his brethren, are good causes to punish him, as to commit till he has found good sureties of his good behavior, but not to disfranchise him. So, if he intends, or endeavors of himself, or conspires with others, to do a thing against the duty or trust of his freedom, and to the prejudice of the public good of the city or borough, but he doth not execute it, it is a good cause to punish him, as is aforesaid, but not to disfranchise him; for *non officit conatus, nisi sequatur effectus;* and *non officit affectus nisi sequatur effectus.* And the reason and cause thereof is, that when a man is a freeman of a city or borough, he has a freehold in his freedom for life, and to others, in their politic capacity, has an inheritance in the lands of the said corporation, an interest in their goods, and perhaps it concerns his trade and means of living, and his credit and estimation; and therefore the matter which shall be a cause of his disfranchisement ought to be an act or deed, and not a conation or an endeavor, which he may repent of before the execution of it, and from whence no prejudice ensues; and they who have offices of trust and confidence shall not forfeit them by endeavors and intentions to do acts, although they declare them by express words, unless the act itself shall ensue, — as if one who has the keeping of a park should say that he will kill all the game within his custody, or will cut down so many trees within the park, but doth not kill any of the game, nor cut down any trees, — it is not any forfeiture; and *sic de similibus,* for in all such cases, either there ought to be an act, or such a negligence as tantamounts, *scil.* when destruction of the game &c., ensues. If a bishop, archdeacon, parson &c., fells all the trees, it is a good cause of deprivation.[1] So, if a Prior aliens the land which he has *in jure domus suæ,* it is a cause of deprivation, as appears in 9 E. 4. 34. a. If a Prior makes dilapidation, it is a good cause to deprive him, as it is held in 29 E. 3. 16. a., 28 H. 6. 46. a. But if it be but a conation, or endeavor, without any act done, in none of those cases is it any cause of deprivation; for in those cases, *voluntas non reputatur pro facto.* And if a contempt (be it of omission or commission) should be a good cause to disfranchise, the best citizen or burgess might be, at one time or other dis-

[1] Citing Yearb. 2 Henry 4, 3b.

franchised, which would be a great cause of faction and contention in cities and boroughs." [1]

§ 855. Further of Bagg's Case: How, by Whom and in What Manner Disfranchised.— "As to the *second*, it was *resolved* that no freeman of any corporation can be disfranchised by the corporation, unless they have authority to do it either by the express words of the charter or by prescription, but if they have not authority, neither by charter nor by prescription, then he ought to be convicted by course of law before he can be removed; and it appears by Magna Charta, cap. 29, *nullus liber homo capiatur, vel imprisonetur, aut disseisitur de libero tenemento suo vel libertatibus, vel liberis consuetudinibus suis &c., nisi per legale judicium parium suorum, vel per legem terræ*, and if the corporation have power, by charter or prescription, to remove him for a reasonable cause, that will be *per legem terræ;* but if they have no such power, he ought to be convicted *per judicum parium suorum, etc.*, as if a citizen, or freeman, be attainted of forgery or perjury or conspiracy, at the King's suit, etc., or of any other crime whereby he is become infamous, upon such attainder they may remove him. So, if he be convicted of any such offense which is against the duty and trust of his freedom, and to the public prejudice of the city or borough whereof he is free, and against his oath,— as if he has burnt or defaced the charters, or evidences of the city or borough or razed or corrupted them, and is thereof convicted and attainted, these and the like are good causes to remove him." [2]

§ 856. Grounds of Disfranchisement under Rule of Lord Mansfield.— The statement given by Lord Mansfield of the three grounds upon which an *officer* of a corporation may be *amoved*,[3] has been adopted by several American courts, as furnishing grounds on which alone a corporation has the inherent

[1] Bagg's Case, 11 Co. Rep. 93, 98.

[2] Bagg's Case, 11 Co. Rep. 93, 99.

[3] *Ante*, § 806. See Rex *v.* Richardson, 1 Burr. 517; Lord Mansfield in Rex *v.* Town of Liverpool, 2 Burr. 723, 732; reaffirmed in Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 473; People *v.* Medical Society, 32 N. Y. 187, 194; Com. *v.* St. Patrick's Benevolent Society, 2 Binney (Pa.), 441, 448; *s. c.* 4 Am. Dec. 453. Compare Riddell *v.* Harmony Fire Co., 8 Phil. (Pa.) 310; Harmstead *v.* Washington Fire Co., 8 Phil. (Pa.) 331.

power to expel one of its members.[1] The fact that the *charter* of an incorporated society enumerates certain grounds of expulsion does not necessarily exclude the right of the society to create other grounds by by-laws, the same being consistent with the law of the land and with the general purposes of the society. "In the nature of the thing," said Tilghman, C. J., "it is perfectly consistent that expulsion should take place in the case provided for, and also in such other cases as the good government of the society might require." [2]

§ 857. **Cases within these Principles.** — Stating conclusions and not details, it has been held that a member of an incorporated mercantile body may be rightfully expelled for obtaining goods under false pretenses; [3] that a member of a benevolent society may be expelled for fraudulently altering an account against the society; [4] that a member of a charitable society may be expelled for feigning sickness in order to obtain relief from the society; [5] that an inmate of a home for aged seamen may be expelled for misbehavior at the table; [6] that a member of an incorporated board of underwriters may be expelled for issuing policies of insurance for smaller amounts than those established by the rules of the corporation; [7] that a member of a mutual benefit society may be expelled for receiving the fee of an ap-

[1] People *v.* Medical Society, 24 Barb. (N. Y.) 571, 578; People *v.* New York Commercial Association, 18 Abb. Pr. (N. Y.) 271, 278; Leech *v.* Harris, 2 Brewst. (Pa.) 571, 577 (unincorporated association); Com. *v.* St. Patrick Benevolent Society, 2 Binn. (Pa.) 441, 448; Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 473; Downer, J., in State ex rel. *v.* Chamber of Commerce, 20 Wis. 63, 71; reaffirmed in Dickenson *v.* Chamber of Commerce, 29 Wis. 45; *s. c.* 9 Am. Rep. 544. In a recent case the grounds of expulsion from voluntary societies were said to be: "1. A violation of such of the established rules of the association as have been subscribed to or assented to by the member, and as provide for expulsion for such violation; 2. For such conduct as clearly violates the fundamental objects of the association and, if persisted in, and allowed, would thwart those objects or bring the association into disrepute." Otto *v.* Tailors' &c. Union, 75 Cal. 308, 314, opinion by Searle, C. J.

[2] Com. *v.* St. Patrick Benevolent Soc., 2 Binn. (Pa.) 441 448; *s. c.* 4 Am. Dec. 453.

[3] People *v.* New York Commercial Association, 18 Abb. Pr. (N. Y.) 271.

[4] Com. *v.* Philanthropic Society, 5 Binn. (Pa.) 486.

[5] Society of the Visitation *v.* Com., 52 Pa. St. 125.

[6] People *v.* Sailors' Snug Harbor, 5 Abb. Pr. (N. S.) (N. Y.) 119 (*semble*).

[7] People *v.* Board of Fire Underwriters, 14 N. Y. Supr. Ct. 248.

plicant for admission and failing to pay it over, and for taking from the chest the original roll of the society and refusing to return it;[1] that a member of a medical society may be expelled for violating a contract with another member, to whom he has sold his practice, not to practice medicine within certain limits.[2]

§ **858. Cases not within these Principles.** — On the other hand, a member of an incorporated benevolent society cannot be expelled under a by-law for "vilifying" another member;[3] and generally the use of contemptuous, insulting or disrespectful language by one member of a corporation to another member, or even to an officer, is not sufficient ground of expulsion;[4] nor is absence from its stated meetings;[5] nor insulting or striking another member of an incorporated club within the club-house, it being a corporation possessing property;[6] nor for a member of an incorporated mutual benefit society to enlist in a volunteer army in time of war, the prohibition of its by-laws extending only to entering a *standing army;*[7] nor for refusing to submit differences to arbitration.[8] Again, in regard to unincorporated clubs, there is English authority to the effect that it will be left to the judicatories of such clubs to determine what conduct in a member will justify his expulsion.[9]

§ **859. Expulsion for Infamous Crimes: Whether a Previous Conviction Necessary.** — Contrary to what was said in Bagg's Case,[10] it seems to be settled that where the expulsion is for an

[1] People *v.* St. George's Society, 28 Mich. 261.

[2] Barrow *v.* Massachusetts Medical Society, 12 Cush. (Mass.) 402, 409

[3] Com. *v.* St. Patrick's Benevolent Society, 2 Binn. (Pa.) 441, 449; *s. c.* 4 Am. Dec. 453.

[4] Rex *v.* University of Cambridge (Dr. Bentley's Case), 1 Str. 557; *s. c.* 2 Ld. Raym. 1334; Fort. 202; Earle's Case, Carthew, 173.

[5] Rex *v.* Richardson, 1 Burr. 517, 541.

[6] Evans *v.* Philadelphia Club, 50 Pa. St. 107. The decision in this case, of Woodward, C. J., at *nisi prius* was affirmed on appeal by an equally divided court. The learned Chief Justice made the case turn on the ground stated in the text.

[7] Franklin Benevolent Association *v.* Com., 10 Pa. St. 357. It was conceded that such a society has *power* to withhold its benefits from members who, contrary to its regulations, assume the perils of war.

[8] Green *v.* African Methodist Episcopal Society, 1 Serg. & R. (Pa.) 254.

[9] Lyttleton *v.* Blackburn, 33 L. T. (N. S.) 641; *s. c.* 45 L. J. (N. S.) 219.

[10] 11 Co. Rep. 93, 99.

infamous offense not immediately connected with the duty of the accused as a corporator, it is not necessary that there should first have been a *trial* and *conviction* upon an *indictment*.[1]

§ 860. Offenses against the Member's Duty as a Corporator. — Within the meaning of the rule of Lord Mansfield and other subsequent cases, offenses against the corporators' duty as a corporator, consist of "things done that work the destruction of the body corporate, or the destruction of the liberties or privileges thereof."[2] In the case of corporations these grounds of expulsion may be, of course, extended by the legislature, in the charter or governing statute, subject only to constitutional limitations; and in the case of voluntary associations, by compact among the members in the form of their articles of association, constitutions, or by-laws, subject only to the principle that they shall not be contrary to law or public policy. It is said to be a tacit condition of membership in an incorporated association of *underwriters* formed for the purpose of establishing uniformity in insurance policies and contracts of the associates, that a member will not oppose or injure the interests of the corporate body. Accordingly, it has been held that if a member insures for a smaller amount than thus established by the rules of

[1] Rex *v.* Richardson, 1 Burr. 517, 538, 539; overruling on this point Bagg's Case, 11 Co. Rep. 93. See, however, Leech *v.* Harris, 2 Brewst. (Pa.) 571; People *v.* New York Commercial Association, 18 Abb. Pr. (N. Y.) 271.

[2] Ang. & A. Corp., §§ 349, 358; 2 Kent Com. 297, 299; Earle's Case, Carthew, 173. Upon *mandamus* to restore Sir Thomas Earle to the office of common councilman of the city of Bristol: "It was insisted that there cannot be any cause to disfranchise a member of a corporation unless it be for such a thing done which works to the destruction of the body corporate or the destruction of the liberties and privileges thereof, and not any personal offense of one member thereof. And of the same opinion was the whole court; whereupon Sir Thomas Earle had a peremptory *mandamus* to restore him, the causes returned being altogether insufficient to remove him." The causes in the particular case were writing a false and contumelious letter to the Secretary of State concerning the mayor of the town and certain citizens thereof; riotously and insolently threatening the mayor at a meeting of the mayor and aldermen; causing the common council books to be brought before the Lord Lieutenant of the city, with the intention to make an accusation against the mayor and to betray the secrets of the city, etc. Sir Thomas Earle's Case, Carth. 173.

the corporation, he breaks this tacit condition and may be expelled by the corporation on a due trial and conviction.[1]

§ 861. Acts Injurious to the Society or to its Reputation. — Where the articles of association of a society authorized the expulsion of a member for being concerned in scandalous or improper proceedings, which might injure the reputation of the society, — it was held to be a good cause of expulsion under these articles that a member had *altered a physician's bill* from $4 to $40, and had presented that bill to the corporation as the ground of his claim.[2] Under articles of association authorizing the expulsion of members guilty of *improper conduct calculated to bring the society into disrepute*, it has been held that it cannot be said that charges of (1) receiving of an applicant for admission his proposed initiation fee and failing to pay it over to the society or to return it to the applicant, who had complained thereof to various persons; and (2) having been entrusted by the secretary with the keys of the society chest to obtain a receipt book therefrom; and of having, at the same time, and without leave, taken from such chest the original roll of the society, and refused to return it, — are insufficient to warrant an expulsion. The court further observed that proceedings for the expulsion of a member, under articles of association agreed to by all the members, are to be considered without too much regard to technicalities, and that substantial justice is to be kept in view, rather than mere form.[3] But where the members of an intended corporation presented their so-called charter to the Supreme Court of Pennsylvania for approval, under the statute of that State,[4] and it was found that it allowed the association to expel any member who should be "guilty of actions which may injure the association," the court refused to approve this, for the reason that it gave to the corporation an indefinite power of expulsion over its members. Lowrie, C. J., said: "For any action which may injure them, they may expel; and therefore, they may expel a member for becoming insolvent. It is totally incompatible with

[1] People *v.* Board of Fire Underwriters, 5 Hun (N. Y.), 248.

[2] Com. *v.* Philanthropic Society, 5 Binn. (Pa.) 486.

[3] People *v.* St. George's Society, 28 Mich. 261.

[4] *Ante*, § 111, *et seq.*

the whole spirit of our institutions, to clothe any body with such indefinite power over its members; for it is equivalent to socialism, and is a rejection of all individual rights within the association. It is common in such charters to found the right of expulsion on the fact that the member has been found guilty of some crime, on a trial in court; and this is quite proper."[1]

§ 862. **Illustrations: "Conduct Injurious to the Character and Interests of the Club."** — In several cases which have been before the courts, members were expelled, either by a general meeting of the club, or by a quorum of its governing committee, under a by-law or rule of the club providing for the expulsion of a member for "conduct injurious to the interests of the club." It will now be considered under what circumstances the courts have refused to interfere in behalf of the expelled member, when expelled under the operation of such a rule. The rules of the Conservative Club authorized the committee to call a general meeting "in case any circumstances should occur likely to injure the welfare and good order of the club," and provided that any member might be removed by the votes of two-thirds of the persons present at such meeting. One of the members of the club had given a pledge to support certain "Liberal" candidates at an election. Upon this a general meeting was called, under the rule in question, and he was expelled by a vote of the requisite majority. It was held by Lord Romilly, M. R., that as the club was a club of a political character, a court of justice could not say that the member had not been expelled because of something "likely to injure the welfare and good order of the club." He read the by-law by interjecting the words "likely *in their, the committee's opinion*, to injure," etc. "That rule," said he, "amounts to this, that if such circumstances as are there referred to should arise, it would be the duty of the committee to call a meeting and submit the matter for the judicial decision of the members of the club at that meeting, and then it would be for them to determine whether any 'circumstances likely to endanger the welfare and good order of the club' had taken place." And he held that, where such a meeting had been called and a vote of expulsion by the requisite majority had taken place, there was no appeal from the decision thus arrived at, to the judicial courts, so long as it appeared that the members of the club had arrived at the result *bona fide*, and without any caprice or improper motive. "None but the members of the club," said he, "can know the little details which are essential to the social well-being of such a

[1] Butchers' Beneficial Association, 35 Pa. St. 151.

society of gentlemen, and it must be a very strong case that would induce this court to interfere."[1] - - - - In another case a member of a club caused to be printed and circulated a pamphlet entitled, "A Farce and a Villany — Heads I win, Tails You Lose," — in which the conduct of Lieutenant-General Stephenson, who was also a member of the club, was severely reflected on. A copy of this pamphlet was enclosed in a wrapper on the outside of which was printed "Dishonorable conduct of Colonel (now Lieutenant-General) Stephenson," and was sent by the plaintiff, by post, to Lieutenant-General Stephenson at his official address, the Guards' orderly room, at the Horse Guards. This having been brought to the notice of the committee of the club, and the member in question, not having disavowed the act upon being charged therewith, was expelled from the club, at a meeting called by the general committee in pursuance of its rules, of which meeting plaintiff was notified, by a vote of 108 in favor of expulsion to 36 against expulsion. It was held by the Court of Appeal, affirming the decision of Jessel, M. R., that a judicial court could not say that this expulsion had taken place *mala fides*, and consequently the court refused to reinstate the expelled member.[2] - - - - In another case an old and gallant officer, a member of the Army and Navy Club, while intoxicated, used the expression to the guest of a member of the club "It is a d——d lie." On becoming sober he apologized in writing, both to the guest and to the member of the club whose guest he had insulted. For this offense he was expelled *without notice* and *without an opportunity of being heard* by the committee of the club. It was held by Lord Romilly, M. R., that the resolution of the committee was *void*, because they had acted without notice and contrary to natural justice. He disclaimed the power of sitting as court of appeal upon the action of the club, in a case where they proceeded upon notice, such as they were bound to give in a *quasi*-judicial proceeding. But, at the same time, he took the liberty of tendering this advice to the committee of the club: "I hope they will carefully consider whether such an offense as this is of so grave a character as, in the interests of the club, to warrant the immediate expulsion of an old and gallant officer, who has been for many years a member of the club. It is not for me to express any opinion upon this part of the case, but I hope, when the committee come to reconsider it, as they will undoubtedly, that they will consider it with an impartial mind, and without any reference to the circumstances that have since occurred. Be that as it may, in my opinion a committee, acting under such a rule as this, are bound to act, as Lord Hatherly

[1] Hopkinson *v.* Marquis of Exeter, L. R. 5 Eq. 63, 68.

[2] Dawkins *v.* Antrobus, 17 Ch. Div. 615.

said, according to the ordinary principles of justice, and are not to convict a man of a grave offense, which shall warrant his expulsion from the club, without fair, adequate and sufficient notice, and an opportunity of meeting the accusations brought against him. They ought not, as I understand it, according to the ordinary rules by which justice should be administered by committees of clubs, or by another body of persons who decide upon the conduct of others, to blast a man's reputation forever — perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.[1]" - - - - It has been held that it is competent for the managing committee of a club, by the requisite majority under its rules, to expel a member of the club for making disparaging remarks in criticism of the action of the committee of the club and the character of the committee. A rule empowered a majority of two-thirds of the committee to expel any member, whose conduct they deemed injurious to the character and interests of the club. The plaintiff, a member, had at a club meeting protested against G.'s re-admission as a member of the club, as being contrary to the rules, and designated the committee as a "pocket borough," and on another evening (November 30, 1881), he had used the same term in the club-house, stating also that the "committee could pass and alter any rules they deemed fit." Some of the plaintiff's remarks were made at the bar of the club. The committee, by a majority of two-thirds, passed a resolution that the plaintiff's conduct November 30, 1881, and in the club generally, in publicly disparaging the committee before strangers and the club servants, was injurious to the character and interests of the club, and that the plaintiff be requested to resign. The majority included G. without whose vote it would not have been complete. The plaintiff moved to restrain the committee from expelling him, alleging that the resolution was solely the result of malice towards him on the part of some of the committee and particularly of G., and not of a *bona fide* regard for the interests of the club. The court declined to interfere, holding that there was nothing to show that the resolution of the committee was not *bona fide*, the reason given for demanding the resignation of the member not being of itself evidence of malice.[2]

§ **863. Frauds upon the Society.**— As suggested by a passage in a previous section,[3] frauds committed upon the society to the prejudice of its funds, as by charging the society with

[1] Fisher *v.* Kean, 11 Ch. Div. 353, 362.

[1] Lambert *v.* Addison, 46 L. T. (N. S.) 20.

[3] *Ante*, § 861.

money which the member has never paid, furnish good grounds of expulsion.[1] If, therefore, a member of a mutual benefit society "feigns himself sick without being so, or continues to draw relief after his recovery," he may be expelled.[2]

§ 864. **Expulsion from Merchants' Exchanges for Dishonest Conduct.**—An incorporated mercantile association, formed among other things, "to inculcate just and equitable principles in trade," may, it has been held, expel a member for obtaining goods under false pretenses, though the offense is not committed within the local jurisdiction of the corporation, nor against any member thereof. The theory of the court is that, when a member of a corporation performs an act in direct contravention of the purposes for which the charter was obtained, he may, under Lord Mansfield's rule above stated,[3] be expelled.[4] On like grounds, a by-law of a chamber of commerce, providing for the expulsion of a member for *non-compliance with* the terms of any *contract*, whether verbal or written, has been held reasonable and valid, even though the contract which was violated in the particular case was void under the statute of frauds, and not made during a session of the exchange.[5] But it has been held that, where it appears from the regulations of a *board of brokers* that their rules are intended exclusively to enforce compliance with contracts relating to dealings in *stocks*, a member cannot be expelled by reason of his non-compliance with a contract relating to *oil leases*, that being a contract not relating to *stocks*, but to *lands*. The court said: "The purchase of a tract of land is not a stock contract. The renting of a house, a store or an oil well or the privilege of taking oil from land is not a stock contract. To so hold would be an utter perversion of terms; and, under the term *stock contract*, would enable the board of brokers to assume jurisdiction over their members in contracts touching realty or personal property, however remote they might be from shares, stocks, and loans such as the board operates in. What the plaintiff really submit-

[1] Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469.

[2] Society for Visitation of the Sick &c. *v.* Commonwealth, 52 Pa. St. 125.

[3] *Ante*, § 806.

[4] People *v.* N. Y. Commercial Association, 18 Abb. Pr. (N. Y.) 271.

[5] Dickenson *v.* Chamber of Commerce, 29 Wis. 45.

ted to when he became a member of the board of brokers was that the board should take jurisdiction if he should refuse to comply with his stock contracts, not that they should have jurisdiction of his contracts touching lands, houses or leasehold estates or farming interests." [1]

§ **865. Suspension for Bankruptcy or Insolvency.** — As already seen, we have the great authority of Lord Mansfield for the proposition that bankruptcy, being in many cases a misfortune rather than a crime, is not sufficient ground for removing a member of the common council of a municipal corporation. This rule obviously does not apply in the case of incorporated merchants' exchanges, or brokers' boards, which are established with the primary object of affording a place where, and establishing rules under which, its members may meet and trade with each other. It is essential to the purpose of such a corporation, that its members should keep the contracts thus made with each other, and where a member becomes disabled from keeping his contracts by reason of insolvency, there is no just ground why this should not be made a cause of suspension from the society, especially where this is in accordance with its rules by which he agreed to be governed when he became a member.[2]

§ **866. Contempt against Corporate Officer.** — The mere fact that a member of a corporation has committed a *gross contempt* against the judicial process of the corporation, it having power to issue such process, and against an officer of the corporation possessing under such process the power of a judge, has been thought an insufficient ground of depriving him of his privileges in the corporation. This was the opinion of the judges in the case of the celebrated Doctor Richard Bentley.[3] The university had issued against Dr. Bentley process in an action of debt for the sum of four pounds and six shillings, and caused it to be served upon him by its beadle, to appear at the next court of the university. The beadle waited upon the learned Doctor, at his lodgings within the jurisdiction, and showed him the process, and served him with it. "And, upon discourse between them concerning the pro-

[1] Leech *v.* Harris, 2 Brewst. (Pa.) 571, 579.

[2] Moxey *v.* Philadelphia Stock Exchange, 14 Phila. (Pa.) 185.

[3] Rex *v.* University of Cambridge, 5 Str. 157; *s. c.* 2 Ld. Raym. 1334; Fort. 202.

cess and the vice-chancellor, Bentley contemptuously said, the process was illegal and unstatutable, and he would not obey it." He also "took the process out of the hands of the beadle, saying the vice-chancellor was not his judge, *et quod præd' procancellarius stulte egit.*" For which contempt the university, at its next court, on the deposition of the beadle, suspended Dr. Bentley *ab omni gradu suscepto.* The Doctor applied to the King' Bench for a *mandamus*, and got his writ. The chancellor, masters, and scholars of the university discovered that they were not the highest judicatory in England, but that they could be compelled to appear at Westminster Hall, according to the ancient formula, "before the King himself." They also discovered that, when they got there, although the King himself was not on the bench, Sir Peter Parker was there in his stead, with the puisne judges at his elbows. "The university," said the Chief Justice, "ought not to think it any condemnation of their honour that their proceedings are examinable in a superior court. I am sure that this court, which is superior to the university, thinks it none. For my own part, I can say, it is a consideration of great comfort to me, that if I do err, my judgment is not conclusive to the party, but my mistake will be rectified, and so injustice not be done." The learned Chief Justice then proceeded to belabor Dr. Bentley as follows: "As to the proceedings against Dr. Bentley, it must be agreed that the vice-chancellor had conusance of the cause, and so the suit was well instituted against him. I must likewise take the process to compel an appearance to be regular, being averred to be according to the course of that court. As to Dr. Bentley's behavior upon being served with the process, I must say it was very indecent, and I can tell him, if he had said as much of our process, we would have laid him by the heels for it. He is not to arraign the justice of the proceedings out of court before an officer, who has no power to examine it. When he said the vice-chancellor '*stulte egit*,' it was what he might have been bound over to his good behavior for; but I believe it is also established that such a behavior will not warrant a suspension or deprivation. He said he would not obey, but *non constat*, but he thought better of it afterwards and did appear. I cannot think the evidence of this contempt was sufficient. It does not appear to have been on oath, as it should have been." Powys, J., concurred *in omnibus*. Eyre, J., was of the same opinion. He said: "But surely for a contempt they can not deprive. We punish our officers, but we do not turn them out." Fortescue, J., also said: "A deprivation can never be the proper punishment for a contempt, because it cannot hold in the case of undergraduates." [1]

[1] Rex *v.* University of Cambridge, 1 Str. 557; 2 Ld. Raym. 1334; Fort. 202.

§ 867. Criticising the Management. — The rules of a *proprietary club* provided " that if in the opinion of the committee, or twenty members, who shall certify the same in writing, the conduct of a member is injurious to the character and interests of the club, the committee by a majority of two-thirds present at a meeting summoned for that purpose, may recommend such member to retire, or expel him." The plaintiff wrote a long letter to the committee, calling their attention to certain matters which, in his opinion, required explanation, and suggested certain alterations in the administration of the club, and gave notice that, unless one of the rules was at once altered by the committee, he should himself move for its alteration at the next annual general meeting of the club. The committee simply acknowledged the receipt of this letter, and informed the plaintiff that his proposals could be made and attended to at the next annual general meeting. Whereupon the plaintiff wrote in a tone which the committee considered very discourteous, and accordingly requested him to withdraw the objectionable letter. On his refusing to do so, the committee, in the exercise of the powers given them by the rules of the club, called a committee meeting to consider the plaintiff's conduct, and expelled him from the club, on the grounds that such conduct on the part of a member, if unchecked, would weaken and paralyze their authority to maintain the discipline of the club. The plaintiff filed his bill to restrain the committee from expelling him, charging that the power vested in the committee had been exercised capriciously and maliciously. It was held by Vice-Chancellor Bacon that the court was not justified in interfering between members and the committee, because the power given by the rules had been exercised *bona fide*, for the welfare of the club, in the opinion of the committee, and there had been no *fraud* or *bad faith* in their exercise.[1]

§ 868. Offenses against Other Members.— From what has already been seen,[2] it will be inferred that offenses against other members of the society will afford no ground of suspension, unless they are of such a character as to amount to violation of the duty of the member toward the society ; and this must, of course, depend upon the nature of the society, the nature of the offense, and the time when and place where it is committed. In a mutual benefit society, the fact of one member making charges against another, that he had " assisted as president of the soci-

[1] Littleton *v.* Blackburn, 33 L. T. (N. S.) 641; *s. c.* 45 L. J. (N. S.) 219.

[2] *Ante*, § 862.

ety in defrauding the society of the sum of fifty cents;" and charging him with "defaming and injuring the same in public taverns," have been held not a sufficient ground of expulsion.[1] In a leading case in Pennsylvania, the charter of an incorporated benevolent society provided that, in order to observe decorum in the society while sitting, there should be no insulting or disrespectful behavior to any of the society; and any member so transgressing, should for the first offense, be fined in the sum of one dollar, for the second, in double that sum, and for the third, be expelled the society. A by-law of the same society provided that "*vilifying any of its members*" should be a crime against the society, for which the member guilty of it should be punished by removal from office, fine, or expulsion, etc. It was held that the by-law was not invalid, because of the existence of the charter provision, though it was inherently invalid. "My opinion," said Tilghman, C. J., "will be founded on the great and single point on which the cause turns. Is this by-law necessary for the good government and support of the affairs of the corporation? I cannot think that it is. I have considered the case with a mind strongly disposed to give a liberal construction to the power of making by-laws. It is my wish to give all necessary powers for carrying into effect the benevolent purposes of this society, and many others which have lately been incorporated on similar principles. But these powers must not be constrained, or the societies, instead of being protected, will be dissolved. The right of membership is valuable, and not to be taken away without an authority fairly derived either from the charter, or the nature of corporate bodies. Every man who becomes a member looks to the charter; in that he puts his faith, and not in the uncertain will of a majority of the members. The offense of vilifying a member, if in private quarrel, is totally unconnected with the affairs of the society, and therefore its punishment cannot be necessary for the good government of the corporation. So far from it, that it appears to me that taking cognizance of such offenses, will have the pernicious effect of introducing private feuds into the bosom of the society and interrupting the transaction of business. I consider it as a point of very great

[1] Com. *v.* German Society, 15 Pa. St. 251.

importance, in which thousands of persons are, or very soon will be, interested; for the members of these corporations are increasing rapidly and daily. On mature reflection, it appears to me that, without an express power in the charter, no man can be disfranchised, unless he has been guilty of some offense, which either affects the interests or good government of the corporation, or is indictable by the law of the land." It was accordingly held that the *by-law* was *void*, and a peremptory *mandamus* was issued to restore the member to his franchise.[1] In another case in the same State, it appeared that two members of an *incorporated club* were sitting together in conversation in the bar-room of the club-house; that a third member came in and used insulting language, understood by one of the two to be applied to himself, who thereupon *struck the offender*;—yet the act was held not such as would justify his expulsion from the club by the members thereof.[2] Mr. Justice Woodward made his decision in this case turn upon the fact that the *corporation* was the *owner of property*. He said: "But what is conclusive of this case is, that the corporation possesses property, real and personal, and is at liberty to accumulate more until an annual revenue of $3,000, comes to be enjoyed; and the relator has purchased and paid for the right to participate in that franchise. It is not a joint-stock company at present, for, under its by-laws, no pecuniary profits are divisible among the members; but it may become so, and whether it does or not, the relator has a vested interest in its estate, and cannot be deprived of it by the proceedings that were had against him. On this point the authorities are clear, and without conflict. Nothing but an express power in the charter can authorize a money corporation to throw overboard one of its members. I have shown that the act of incorporation contained no such power. On the contrary, it excluded it; for the proviso reads that 'nothing herein contained shall be so construed as to authorize said Philadelphia Association and Reading Room to do *any other act or acts* in their corporate capacity than are herein expressed."[3] The decision is believed to be unsound. Not only most incorporated clubs, but also religious, benevolent

[1] Com. *v.* St. Patrick's Benevolent Soc., 2 Binn. (Pa.) 441, 449; *s.c.* 4 Am. Dec. 453.

[2] Evans *v.* Philadelphia Club, 50 Pa. St. 107.

[3] *Ibid.* 118.

and other societies formed for ideal purposes, generally own more or less property in which the rights of the members are usufructuary merely. Nevertheless, according to the entire current of judicial authority, such corporations stand upon an entirely different footing from joint-stock corporations, organized for mere pecuniary gain, in respect of the power of expulsion over their members. In the case of a club organized for social purposes, one of the first duties of the member toward the club would seem to be to keep the peace with his fellow-members. While the club might not exercise the power of expulsion over him for a breach of the peace against another member, committed, so to speak, *in pais*, yet it should seem that it might clearly do so, for a breach of the peace against such a member committed in the club-house itself. It should further be added that upon an appeal to the court in bank the judgment was affirmed by an equal division of the court.

§ 869. Refusal to Submit to Arbitration or to Comply with Award. — As suggested in the previous chapter, the judicial courts have always been jealous of the establishment of private rules or engagements by which persons surrender their right to appeal for justice to the courts of their country; and, as hereafter seen,[1] the Supreme Court of the United States has held that a statute of a State requiring a foreign corporation, as a condition of doing business within the State, to enter into an agreement not to remove suits against it from the State to the Federal courts, has been held bad. Upon similar lines of reasoning, courts have refused to uphold an expulsion of a member of a corporation because of his refusal to comply with a regulation requiring differences to be submitted to arbitration, and also because of his refusal to comply with an award made by arbitrators appointed in conformity with the regulations of the corporation. According to the discipline of the Methodist Episcopal Church, by which a society of that *church* called the African Methodist Episcopal Society was governed, disputes between members were to be settled by arbitration, and any member, who should commence an action at law against another member, was liable to

[1] *Post*, § Ch. 195.

expulsion, "except the case be of such a nature as required and justified a process at law." A member was tried upon a charge of having, contrary to the rules and discipline of the society, entered a lawsuit against another member, was found guilty and expelled. In a proceeding by *mandamus* to compel the society to restore him to his membership, the return set forth that the relator had brought suit against one Howell, a member of the society, in violation of its rules, but did not aver that the case was not of such a nature as required and justified a process at law. It was held that, because of this omission the case was not brought within the exception to the rule, and that the return failed to show lawful grounds for the expulsion of the member. A peremptory writ to restore him to his membership was accordingly awarded.[1] So, the mere fact of a non-compliance with an award made by arbitrators, appointed in conformity with the articles of association of a *mercantile exchange*, has been held insufficient ground to warrant the expulsion of the member, — the view of the court being that "if the defendant [the corporation] has the power and authority to act as an arbitration court under its charter, in relation to all claims of one of its members against another, arising from cotton transactions, its decisions and awards are subject to be reviewed and examined, so far as the legal rights of the parties are concerned, by the judicial tribunals of the State, in the same manner as the awards to other arbitrators are reviewed and examined.[2]

§ 870. Illustration.— The articles of association of a cotton exchange, contained the following provision: "Any member who shall be accused of willfully violating the constitution and by-laws, or of fraudulent breach of contract, or of any proceeding inconsistent with the just and equitable principles of trade, or of other misconduct, may, on complaint, be summoned before the full board of directors; and if the charges against him be, in the opinion of the board, substantiated, he may, by a vote of not less than two-thirds of the members of the board, be suspended or expelled from the exchange." Another article provided that all claims of one member against another, arising from cotton transactions, should be subject to arbitration, specified the manner in which the arbitration should be had, and established a board

[1] Green *v.* African Methodist Episcopal Soc., 1 Serg. & R. (Pa.) 254.

[2] Savannah Cotton Exchange *v.* State, 54 Ga. 668, 670.

of appeals. It was held that the failure of a member to comply with an award rendered upon such an arbitration, against his protest that the exchange had no jurisdiction of the matter in issue, was not such misconduct as would authorize his expulsion.[1] The opinion in this case does not seem to rest upon any sound foundation. The articles of association appear to have been the fundamental law of the corporation, its charter. They constituted the compact between its members, into which every member entered when he became a member, and the expulsion appears to have taken place strictly in accordance with that compact. No sound reason is given by the court for its conclusion.

§ **871. Appealing to the Judicial Courts.**— Where the charter of a corporation declared its purpose, among other things, to be "to adjust controversies between its members, and to establish just and equitable principles in the cotton trade;" and gave it power to make all proper and needful by-laws, not contrary to the constitution and laws of the State of New York or of the United States;" and "to admit new members and expel any member, in such manner as may be provided by the by-laws;" and the by-laws provided for the expulsion of members for *improper conduct*, but did not state what should be considered as such; and there was in the charter or by-laws no express authority to determine who was the owner of a right to a membership in dispute,—it was held that, in the case of a dispute as to the right to a membership, one who had been a member claiming the right to retain his membership against another party claiming to have acquired it, was not guilty of improper conduct in appealing to the judicial courts for an injunction upon the corporation to prevent a sale of his seat. The case was that the relator was in default upon a contract, and the by-laws provided that in such a case his membership should be disposed of by sale, and it was so disposed of, and he sued out a writ of injunction restraining the sale, and because of his thus appealing to the judicial courts his membership was declared forfeited; and it was held that he was entitled to be reinstated by *mandamus*.[2]

[1] Savannah Cotton Exchange *v.* State, 54 Ga. 668.

[2] People *v.* New York Cotton Exchange, 8 Hun (N. Y.), 216, 219. Compare Belton *v.* Hatch, 109 N. Y. 193.

§ 872. Negligence, Misconduct in Office, or any Other Reasonable Cause. — The foregoing decisions, with relation to *social clubs*, are based upon the analogy of a decision rendered in 1850 by Lord Langdale, M. R., in a case where the court was applied to to reinstate certain *directors of a joint-stock partnership*, who had been expelled under the following circumstances: The expulsion took place at a meeting of the company regularly convened. Resolutions were passed, removing the directors in question for misconduct. The resolutions were based upon a provision of a deed of settlement of the company, to the effect that such a meeting might remove any director "for negligence, misconduct in office, or any other reasonable cause." It was held, on a motion to set aside the proceedings of expulsion, and also for the election of new directors and for an injunction to restrain the new directors from acting, — that the expression "reasonable cause," in the deed of settlement did not refer to such cause as, in a court of justice, would be held reasonable, but only to such a cause as should be deemed reasonable to the shareholders assembled at a meeting duly convened, and therefore that the court had no jurisdiction to interfere. Nor, where no case of direct fraud was proved, to determine whether the decision of the meeting had or had not been unduly influenced by unfounded statements made by persons taking an active part in the proceedings. As this may be deemed in some sense a leading case by reason of its being the foundation of the law relating to the expulsion of the members of social clubs, it will be profitable to set out the reasoning of Lord Langdale in his opinion. He said: "Now the 27th clause of the deed provides 'that an extraordinary general meeting specially called for the purpose may remove from his office any director or auditor for negligence, misconduct in office or any other reasonable cause.' The argument for the plaintiffs rested on the allegation that the general cause of removal referred to in the clause, being expressed to be reasonable, prevents the power referred to from being a power to remove at pleasure arbitrarily or capriciously, and made it requisite that the proceedings for exercising the power should be in its nature judicial, and that the reasonable cause should be such as a court of justice would consider good and sufficient. If this argument could be sustained, all proceedings at such meeting would be subject to the review of the courts of justice, which would have to inquire whether the cause of removal which was charged was in their view reasonable, whether the charges were *bona fide* brought forward, whether they were substantiated by such evidence as the nature of the case required, and whether the conclusion was come to upon a due consideration of the charge and evidence. But the deed is silent as to these matters, and the question is whether any such power of control in the courts of justice is to be

inferred from the words 'reasonable cause' contained in the 27th clause; whether the expression 'reasonable cause' contained in such a deed of a trading partnership can be held to be such a cause, as upon investigation in a court of justice must be held to be *bona fide* founded on sufficient evidence and just; or whether it ought not to be held to mean such cause as, in the opinion of the shareholders duly assembled, shall be deemed reasonable. We think the latter is the true construction and effect of the deed. In a moral point of view, no doubt, every charge of a cause of removal ought to be made *bona fide*, substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence; and those who act on other principles may be guilty of a moral offense; they may be very unjust, and those who (being present at the meeting) are innocently misled by the statements made to them, have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is, whether by this deed the shareholders duly assembled at a general meeting might not, or had not a right to, remove a director for a cause which they thought reasonable, without its being incumbent upon them to prove to this or any other court of justice that the charge was true and the decision just, and that the case was substantiated after a due consideration of the evidence and charge. We cannot take upon ourselves to say that in the case of a trading partnership like this, this court has, upon such a clause in the deed of partnership, jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced. All such meetings are liable to be misled by false or erroneous statements, and the amount of error or injustice thereby occasioned can rarely, if ever, be appreciated. This court might inquire whether the meeting was regularly held, and in cases of fraud clearly proved, might perhaps interfere with the acts done; but supposing the meeting to be regularly convened and held, the shareholders assembled at such meeting may exercise the powers given them by the deed. The effect of speeches and representations cannot be estimated, and for those who think themselves aggrieved by such representations, or think the conclusion unreasonable, it would seem that the only remedy is present defence by stating the truth and demanding time for investigation and proof, or the calling of another meeting at which the whole matter may be reconsidered. The plaintiffs objecting to this meeting and considering it illegal, protested against it, but abstained from attending, and therefore made no answer or defense to and required no proof of the charges made against them. The adoption of this course was unfortunate, but does not afford any grounds for the interference of this court. We are far from thinking that the charges made by Mr. Snell against the plaintiffs and Mr. John-

son were well founded. He appears to have made a very exaggerated, and in some respects an unfounded statement; and in the present state of the evidence, if the question were, whether the charges were well founded, we might think it our duty to say that they are not. But as the real question is whether the shareholders at the meeting had not a right to remove directors for such causes as to them seemed reasonable, and as we think that on the true construction of the deed, they had such right, we are of opinion that the order granting an injunction ought to be discharged." [1]

§ 873. Expulsion of Members of Incorporated Medical Societies. — Following the decision of Lord Mansfield in Rex *v.* Mayor of Liverpool,[2] it has been held by the New York Court of Appeals, that the only common law grounds of expulsion on which a medical society, incorporated under the statutes of that State, can expel a member, are these: 1. A violation of duty to the society, as a member of the corporation. 2. Offenses as a citizen against the laws of the country. 3. A breach of duty in respect alike to the corporation and the laws. And that the only statutory ground of expulsion was the presentment of a formal charge by a two-thirds vote of the society, and a conviction by the county court "of gross ignorance or misconduct in his profession, or of immoral conduct or habits." It was further held that the code of medical ethics, adopted by the by-laws of a county society, is obligatory on the members alone, and its non-observance, previous to membership, furnishes no legal cause for expulsion.[3] A member of the Massachusetts Medical Society was tried and unanimously expelled upon a charge of "*gross immorality*," the grounds of the case being that for a large sum of money he had relinquished his practice to another member of the society, had gone out of the State for a year or more, and then had returned and *broken his contract* with such member by *resuming his practice*. This fact was substantially admitted, and the accused had full opportunity of being heard in his defense. The society, under its by-laws, the validity of which were not challenged, had power to expel a member for (among other things) "any gross and notorious im-

[1] Inderwick *v.* Snell, 2 Mac. & G. 216, 221.

[2] 2 Burr. 732.

[3] People *v.* Medical Soc., 32 N. Y. 187, 194.

morality." The court refused to restore him by *mandamus*, proceeding upon the view that such a case had not been shown as to warrant the exercise of that extraordinary power. Mr. Chief Justice Shaw said: "The medical society, both by its charter and by-laws, had jurisdiction to inquire into and pass judgment upon the conduct of its members, and, in a proper case, to expel a member; and, 'gross immorality' in a professional transaction, having a tendency to bring the profession into dishonor before the community, if distinctly charged and proved, may be of such character as to justify the exercise of their power. The proceedings appear to have been conducted with deliberation, and several opportunities were given to the petitioner to be heard before the committee and the counselors, and the vote of expulsion was unanimous. Without saying that the court would in no case afford its authority by writ of *mandamus* to restore a member wrongfully expelled from such society, we cannot perceive, upon examination of the proceedings, any evidence of haste or prejudice against the petitioner, or that the society came to a wrong decision, or acted in violation of the petitioner's rights." [1] It seems that the doctrine of *twice-in-jeopardy* does not apply to a proceeding to expel a member from a medical society. Accordingly, it has been held that such a society is not precluded from preferring charges against one of its members by the fact of having once refused to prefer the same charges.[2] The mere fact that the member has been *tried upon an indictment* for the charge in a court of criminal jurisdiction and acquitted, does not deprive the medical society of jurisdiction to try him upon a charge of having committed the same offense, in so far as it affects his right of membership in the society, and affords no bar to an inquiry under the statute for the purpose of depriving him of his right to practice physic and surgery.[3] A *statute* which undertakes to regulate, by some general provision, the practice of physic and surgery within the State, and which, with a view to the moral character as well as the learning and skill of the members, gives to county medical societies the right

[1] Barrow *v.* Massachusetts Med. Soc., 12 Cush. (Mass.) 402, 409.

[2] Re Smith, 10 Wend. (N. Y) 449.

[3] *Ibid.*

to try any of their members against whom specific charges of gross ignorance or professional misconduct or of immoral conduct or habits may be brought, — has been held *not unconstitutional*, as being prohibited by that clause of the bill of rights of the constitution of the State which declares that no person shall be *held to answer* for a capital or otherwise infamous crime, with certain exceptions, unless on *presentment* or *indictment* by a grand jury. Nor does it conflict with those provisions of the State and Federal constitution which secure to the citizen the right of trial by jury; nor to a provision of the State constitution prohibiting the establishment of any new court, except such as shall proceed according to the course of the common law.[1] The court reasoned thus: "When the constitution speaks of a person not being held to answer for a capital or otherwise infamous crime, unless on presentment or indictment, etc., it means, to answer in a course of criminal proceedings; to answer *criminaliter*, with a view to punishment under the criminal laws, and has no reference whatever to those collateral or incidental proceedings which are disciplinary in their character or have exclusive regard to some special character or relation which belongs to the individual. The provision in the constitution of the United States in relation to the trial by jury, applies only to the Federal courts; and our State constitution secures the right in all cases in which it has heretofore been used. Now, it never was in use, before or since the adoption of the constitution, in cases like this. It applies only to cases of trials of issues of fact in civil and criminal proceedings in courts of justice. The proceedings under this statute are not a trial as for an offense with a view to punishment, but a mere summary inquiry to ascertain facts for a collateral purpose. Nor is this a *court* proceeding differently from the course of the common law. The provision of our constitution which forbids the creation of such courts, refers, as was correctly urged in argument, to courts exercising the usual jurisdiction of courts of law, but proceeding by *modes* unknown to the common law; but it does not prohibit, and never has been considered as prohibiting the organization of various tribunals, as commissioners, etc., for other purposes than the administration of civil

[1] *Ibid*, 449, 456.

or criminal justice. The power conferred by this statute is similar in its character and consequences to that which is possessed by the courts of record of this State over counsellors, solicitors and attorneys." [1]

§ 874. Member of Trades Union Working for Parties against Whom a Strike had been Ordered. — Where an unincorporated trades union consisting of journeymen tailors had a constitution which provided for no other ground of expulsion than that "if any member defrauds this union, he shall be dealt with as the central body may decide," — it was held that a member of an association having a benefit fund could not be lawfully expelled when he was guilty of no other offense than that of working for parties against whom a strike had been ordered; such an offense under the laws being punishable by a fine only; that an expulsion for such a cause was not in good faith, was not fair, and was contrary to natural justice; and that the charge that "conspiracy to injure and destroy the union" was in substance but a pretext to punish him for an offense subjecting him to a fine only, in a manner wholly different from the imposition of the penalty provided therefor. The trial and conviction of the member was described as "a travesty upon justice, and lacking in the essential elements of fairness, good faith and candor, which should characterize the actions of men in passing upon the rights of their fellowmen." [2]

§ 875. Enlisting in the Volunteer Army in Time of War. — The by-laws of an incorporated beneficial association provided that "no soldier of a standing army, seaman, or mariner shall be capable of admission; and any member who shall voluntarily enlist as a soldier, or enter on board of any vessel as a seaman or mariner shall thenceforth lose his membership." A member joined a volunteer corps, raised in another State, who tendered their services to the United States under the act of 1846, and were accepted and mustered into the service. The relator continued in such service in the war with Mexico, until the expiration

[1] *Ibid.*, 457.

[2] Otto *v.* Tailors' &c. Union, 75 Cal. 308, 315, 316. Compare Merscheim *v.* Mutual Protective Union, 8 N. Y. Supp. 702.

of his term. It was held that this act did not authorize his expulsion from the association, and he was restored by *mandamus*. As he joined a volunteer corps and as the prohibition was against becoming a soldier of "a standing army," the act which he had done was not strictly within the prohibition. The court conceded to such a society the power of limiting its benefits, so as to exclude members who should become sick or disabled in consequence of the perils of war, leaving such to be provided for by the government. The court also suggested that it might have been the duty of the court in the first instance, to withhold its certificate to a society having such a constitution, on the ground that the provision deterred its members from serving their country in time of peril.[1]

§ 876. Trial Under an Act of the Legislature Passed Subsequently to the Offense. — It has been held that where rights are conferred by an act of the legislature subject to termination in a certain manner, and the power to modify, alter or repeal such act is reserved, the legislature may prescribe a new and different mode in which the rights may be put an end to; and that under such modification of the law a forfeiture of rights may be declared although the acts which are the cause of the forfeiture, happened previous to such modification. It was so held where the subject of the inquiry was the validity of the expulsion by a medical society of one of its members under an act of the legislature changing the mode of procedure, which act was passed subsequently to the commission of the offense charged.[2]

[1] Franklin Ben. Asso. *v.* Com., 10 Pa. St. 357.

[2] Re Smith, 10 Wend. (N. Y.) 449.

ARTICLE II. CORPORATE PROCEEDINGS TO EXPEL.

§ 881. Must Proceed upon Notice, Inquiry and Hearing. — It is absolutely essential to the validity of the amotion of an officer of a corporation,[1] or of the suspension or expulsion of a member of an incorporated or unincorporated society, that the accused should be notified of the charges against him, and of the time and place set for their hearing; that the accusing body should proceed upon inquiry, and consequently upon evidence; and that the accused should have a fair opportunity of being heard in his defense.[2] This rule, it is said, is not confined to

[1] *Ante*, § 820.

[2] Bagg's Case, 11 Co. Rep. 93, 99; Fisher *v.* Keane, 11 Ch. Div. 353; Hopkinson *v.* Marquis of Exeter, L. R. 5 Eq. 63; Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346; Wood *v.* Woad, L. R. 9. Exch. 190; Inness *v.* Wylie, 1 Car. & K. 257; Willis *v.* Childe, 13 Beav. 117; Murdock *v.* Phillips Academy, 12 Pick. (Mass.) 244; Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38; Re Hammersmith, 4 Exch. 87, 97; Capell *v.* Child, 2 Cromp. & J. 558, 579; People *v.* Fire Department, 31 Mich. 458, 465; Roehler *v.* Mechanics' Aid Society, 22 Mich. 86; Com. *v.* German Society, 15 Pa. St. 251; Reg. *v.* Saddler's Company, 10 H. L. Cas. 404; Com. *v.* Pennsylvania Asso. 2 Serg. & R. (Pa.) 141; White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 152, 199; *s. c.* 2 Daly (N. Y.), 329; Loubat *v.* Leroy, 40 Hun (N. Y.), 546, 552; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69; Rex *v.* Univer-

the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.[1] So far as the writer knows, there are but two exceptions to this rule: 1. In cases of amotion from corporations, where the member becomes a non-resident, so that it is impracticable to give him notice.[2] 2. In cases of certain mutual benefit societies, whose rules provide that the non-payment of an assessment after notice shall, *ipso facto*, work a forfeiture of membership, or of the member's benefit certificate. These rules are upheld, on the principle that the right to notice and a hearing is not a right of so high a nature that it may not be *waived* by a person who is *sui juris*, and that a member of such a society may therefore part with it by *contract*, in agreeing to become a member of the society, subject to its rules and regulations, among which is the regulation in question.[3] But where there is no rule providing for an *ipso facto* forfeiture, the general principle obtains that the member's right of membership is not forfeited, unless an adjudication of forfeiture has been made by the society or its prescribed judicatory, in a proceeding which has taken place upon inquiry,

sity of Cambridge (Dr. Bentley's Case), 1 Str. 557; *s. c.* 2 Ld. Raym. 1334; Fort. 202; Ex parte Ramshay, 18 Ad. & El. (N. S.) 173, 189; Rex *v.* Town of Liverpool, 2 Burr. 723, 731; Wachtel *v.* Noah Widows' &c. Society, 84 N. Y. 28; *s. c.* 38 Am. Rep. 478; Southern Plank Road Company *v.* Hixon, 5 Ind. 165; People *v.* St. Franciscus Benevolent Society, 24 How. Pr. (N. Y.) 216; Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. C.), 274; Bartlett *v.* Medical Society, 32 N. Y. 187; Washington Benevolent Society *v.* Bacher, 20 Pa. St. 425; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670; People *v.* Young Men's Society, 65 Barb. (N. Y.) 357; Reg. *v.* Archbishop of Canterbury, 1 El. & El. 545, 559; Beaurain *v.* Scott, 3 Camp. 388. Medical & Surgical Society *v.* Weatherly, 75 Ala. 248; Lambert *v.* Addison, 46 L. T. (N. S.) 20, 24. The following language of Seneca has been quoted in several judicial opinions as an expression of this rule: "*Qui statuit aliquid parte inaudita altera, æquum licet statuerit, haud æquus fuit.*" Sen. Med. 199, 200; Bagg's Case, 11 Co. Rep. 93, 99; Wood *v.* Woad, L. R. 9 Exch. 190, 196, per Kelley, C. B.; Re Hammersmith, 4 Exch. 87, 97; Reg. *v.* Archbishop of Canterbury, 1 El. & El. 545, 569, per Ld. Campbell, C. J.

[1] Wood *v.* Woad, L. R. 9 Exch. 190, 196, per Kelley, C. B.

[2] *Ante*, § 821.

[3] For a striking illustration of this see Blisset *v.* Daniel, 10 Hare, 493, where a member of a numerous partnership was expelled without a formal meeting, and without having an opportunity of making his defense, there being no fraud or want of good faith.

in accordance with the provisions of its statutes.[1] This right to be heard is not at all affected by the strength or cogency of the evidence against the accused.[2] Unless the accused has voluntarily parted with it, there is no discretion to deny it, either in the corporate judicatory, or in the judicial courts, in a proceeding for reinstatement.[3] The right does not depend upon the circumstance of the accused being able to present *evidence* in his defense; he has a right to appear before the tribunal which tries him for the mere purpose of *arguing* in his own behalf.[4] Where, however, an *appeal* to a higher judicatory is taken in writing and the appeal is answered by the persons appealed against, and the appellant replies in writing to that answer, and makes no request for a further hearing, it will be presumed, in a proceeding for his reinstatement, that the appeal has been sufficiently heard.[5]

§ **882. What this Principle Includes.** — What this principle includes has already been discussed in respect of the amotion of officers.[6] It may be doubted whether the five distinct elements of such a proceeding, which were held necessary in a leading case[7] are in strictness required, in order to the validity of a sentence of expulsion, according to the current of modern authority. But it has been held that the return to an alternate *mandamus* sued out to restore a member who has been expelled from a corporation, must show that the relator had *notice* to appear and defend himself at the meeting at which the charges against him were appointed to be investigated; that an *assembly* of the proper persons was duly held; what *proceedings* took place before them; that the relator was *convicted* of the offense charged; and that there was an *actual amotion* by the assembly.[8] The right to notice and an opportunity to defend necessarily implies that the accused is entitled to be informed of the

[1] See Illinois &c. Soc. *v.* Baldwin, 86 Ill. 479; Olmstead *v.* Farmers' Mutual Fire Ins. Co., 50 Mich. 200.

[2] Loubat *v.* Leroy, 40 Hun (N. Y.), 546, 551.

[3] Reg. *v.* Archbishop of Canterbury, 1 El. & El. 545, 559.

[4] *Ibid.* 545, 559.

[5] Rex *v.* Bishop of Ely, 5 T. R. 475, as explained in Reg. *v.* Archbishop of Canterbury, 1 El. & El. 545, 560, 561. See also Reg. *v.* Archbishop of Canterbury, 6 El. & Bl. 546.

[6] *Ante*, §§ 820, 821.

[7] Murdock *v.* Phillips' Academy, 12 Pick. (Mass.) 224; stated *ante*, § 820.

[8] Com. *v.* German Soc., 15 Pa. St. 251.

charges against him. Accordingly, a *formal complaint* is, in general, necessary to the validity of a sentence of expulsion;[1] but this may be dispensed with in the case of a voluntary association or partnership, by the regulations of the society, which are in the nature of a contract among the members.[2] Moreover, the statement that the society, or its judicial body, which passes the sentence of expulsion, must proceed upon inquiry, necessarily implies that it cannot expel the member in case of his failure to appear after notice, by a mere sentence in the nature of a judgment by *default*, without hearing any *evidence* in substantiation of the charges against him.[3] It has been further held, on grounds which are undoubtedly sound, that this right includes a fair opportunity to the accused to *cross-examine* the witnesses which are adduced against him.[4] It is scarcely necessary to add that, where this principle governs, there can be no suspension or expulsion by the mere *ministerial act* of an officer of the society, — as, for instance, its secretary;[5] nor by the society itself, upon the mere report of a committee of investigation, for this is not evidence, and in a proceeding thereupon the society does not proceed upon inquiry;[6] and finally that a corporate by-law which authorizes a suspension or expulsion without notice and a hearing, is void.[7] It also follows from the foregoing, that, where there has been one trial and a vote of expulsion has failed to carry by reason of not receiving the two-thirds majority required by the by-laws, the accused member cannot be expelled at a subsequent meeting, even by a two-thirds majority, without a new notice and a new hearing, if he can be expelled at all. The reason is that the first trial operates as an acquittal.[8] But if the first trial is,

[1] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670.

[2] See, for illustration, Blisset *v.* Daniel, 10 Hare, 493, which was the case of a numerous partnership.

[3] People *v.* Young Men's &c. Society, 65 Barb. (N. Y.) 357. In every case of judgment by default, before a final judgment can be rendered, there must be an inquiry of damages, or, according to the old common-law form of speech, a writ of inquiry, and this necessarily implies the hearing of evidence.

[4] Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

[5] People *v.* Fire Department, 31 Mich. 458, 466.

[6] Com. *v.* German Society, 15 Pa. St. 251.

[7] People *v.* Fire Department, 31 Mich. 458; Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69.

[8] Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 473.

for any reason, a mere nullity, — as where it has taken place without notice, without a formal complaint, and in the absence of the accused, — the judicatory of the society may, when advised of that fact, treat it as a nullity, restore the accused to membership, and proceed to try and expel him in the regular way, in which case his expulsion will be valid.[1] Moreover, where the accused has had one hearing before the judicatory vested with power to remove him, and the evidence raises a fair inference that the inquiry was known to all parties to be finally closed, he will not be reinstated by a judicial court because there was not a *second notice* before the sentence of removal was passed upon him, where the judicial officer merely took time after the hearing to consider of his judgment.[2]

§ 883. Right to Notice Exists Although the Evidence against the Accused may be very Cogent. — The fact that the evidence against the accused member may be very cogent, does not take the case out of the rule, and excuse the committee or judicatory of the society or club from giving him notice of the proceedings by which it intends to take action. Speaking of such a case, it was said by Daniel, J.: "He had no opportunity to appear before the governing committee, or to be heard concerning the action which it might be considered proper to take. If he had been, notwithstanding the cogency of the evidence against him, he might have submitted some reasons, or some considerations, which would have mitigated the action of the members of the committee in attendance, and resulted in a punishment short of that which was provided for by the resolution. This probability, or even though it may only be possibility, has, in all investigations of this description, been considered sufficient to require, as a demand of justice, that the party proceeded against shall, in all cases, have notice of the hearing intended to be had, and an opportunity to exculpate himself as far as that may be done, either in the vindication or palliation of the misconduct forming the foundation of the complaint. The legal principle is a general one, affecting all proceedings which may result in loss of property, position or character, or any disaster to another, — that he shall be first heard by the board or tribunal considering his case before that body will be legally permitted to pronounce his condemnation."[3]

[1] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 683.

[2] Ex parte Ramshay, 18 Ad. & El. (N. S.) 172.

[3] Loubat *v.* Le Roy, 40 Hun (N. Y.), 546, 551. Reversing *s. c.* 15 Abb. N. C. (N. S.) p. 1.

§ 884. Instance Showing the Right to Notice. — Where by the by-laws personal notice was required to be given in February of each year to defaulting members, without which notice there could be no forfeiture of their membership, it was held that an amendment leaving the declaration of the forfeiture to the secretary, who acts as witness and judge on his own assertion, and without either hearing or appeal, and in a matter made to depend on his own performance of a prior duty, — is void.[1] - - - - The constitution of a voluntary medical society provided that if the annual dues were not paid by a certain time "the defaulter shall forfeit his membership, . . . and of this he shall be duly notified by the secretary," and that notice of the requirement should be served each year, and that on reading the roll of members any such defaulter "shall be immediately stricken from the roll." It was held, that the non-payment of the dues at the specified time was not, *ipso facto*, a forfeiture of membership.[2] - - - - When the statute requires that *charges* shall be preferred before a member of an incorporated association can be expelled, this is not done by serving a notice to appear to show cause against expulsion "for disobedience of the order of the board of directors." Nor does appearance in response to such a notice confer jurisdiction, the member denying the power to proceed.[3] - - - - An expulsion of a member without notice to him, and without a vote of the corporation, — has been held unlawful, though the charter provided that if any member should neglect, for three months, to pay his arrearages, he should be expelled.[4] - - - - A leading case on this subject is *Bentley's Case*, more properly cited as Rex *v.* The University of Cambridge,[5] which was a *mandamus* by the celebrated Doctor Bentley to restore him to his degrees in the University of Cambridge, of which he had been deprived by a court of that University called the Congregation. The return showed that the University was, by certain ancient statutes, a court of record, and had conusance of certain matters where one of its members was a party; that Dr. Bentley had been served with a summons in debt for the small sum of four pounds six shillings; that he had thereupon acted contemptuously by saying that the process was illegal; that the vice-chancellor was not his judge; that the vice-chancellor had acted rashly, — *stulte egit;* and that he had taken away the process from the beadle. The court of King's Bench held,

[1] People *v.* Fire Department, 31 Mich. 458, 466.

[2] Medical & Surgical Society *v.* Weatherly, 75 Ala. 248 (Brickell, C. J. dissenting).

[3] People *v.* Musical &c. Union, 47 Hun (N. Y.), 273.

[4] Commonwealth *v.* Pennsylvania Benf. Inst., 2 Serg. & R. (Pa.) 141.

[5] 1 Str. 557; *s. c.* 2 Ld. Raym. 1334; Fort. 202. Stated at large under another head, *ante*, § 866.

after two arguments, that Doctor Bentley was entitled to be restored, because it did not appear from the return that the Congregation had given the relator notice that it had met for the purpose of considering the question of depriving him of his degrees, or that he had had any opportunity to make defense before that court. All the judges concurred in this, and Mr. Justice Fortescue used the following remarkable language: "The laws of God and man both give the party an opportunity to make defense, if he has any. I remember to have heard it observed by a very learned man upon such an action, that even God himself did not pass sentence upon Adam before he was called upon to make his defense. 'Adam,' says God, 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also." - - - - The rules of the Beef Steak Club provided that in case the conduct of any member should, in the opinion of the committee, *after inquiry*, be injurious to the welfare and interests of the club, the committee should call upon him to resign, and in the event of his refusal to do so, should call a general meeting, which was to be called on giving a fortnight's notice, at which it should be competent for the votes of two-thirds of those present to expel such member. The committee having called on the plaintiff, a member of the club, to resign on the alleged ground that his conduct was injurious to its interests, and the plaintiff having refused to do so, a general meeting was summoned by notices issued on the first of November for the 14th of November. Only 117 members were present, of whom 115 voted — 77 in favor of a resolution for expelling the plaintiff, and 38 against it. The resolution was declared carried. On a motion to restrain the committee from interfering with the enjoyment by the plaintiff of the benefit and use of the club, it was held on the facts of the case that the committee had acted without full inquiry and without giving the plaintiff notice of any definite charge; that the general meeting was summoned without proper notice; that the resolution was carried by an insufficient majority; and that the plaintiff was entitled to an injunction.[1]

§ 885. Analogous Principle that a Public Officer is not Removable without Notice. — In Lord Campbell's time the Queen's Bench had occasion to consider the legality of the act of the chancellor of the Duchy of Lancaster, in removing a county judge under a statute which provided that "it shall be lawful for the said Lord Chancellor, . . . if he shall think fit, to remove, for inability or misbehavior, any such judge."[2] It appeared that, on a memorial addressed

[1] Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346.

[2] Stat. 9 & 10 Vict., chap. 95, § 18.

to the chancellor, charging the relator with general misbehavior, and particularizing one instance more strongly, and praying for his dismissal, — the chancellor had held an inquiry which had been attended by the relator and his counsel, and had heard evidence on the charges, not on oath or affirmation, and, within a few days after the close of the inquiry, had dismissed the relator, by an instrument finding inability and misbehavior, but not specifying any particular instances. Affidavits denying the inability and misbehavior in the cases adduced on the inquiry, and generally, were put in. The court refused the rule, on the ground that it did not appear that the relator had not been fully heard, or that the charges, if true, did not show inability and misbehavior, and on the further ground that the decision of the chancellor was final, no appeal therefrom having been provided for. On the subject of the right to notice and an opportunity of being heard, Lord Campbell reaffirmed the rule of many other cases in the following strong language: "We think that it would have been open to Mr. Ramshay to show that he was removed without notice of any charges against him, or without an opportunity of being heard in his defense, or that no evidence was adduced to support the charges, or that the complaints against him were not for inability or misbehavior in his office, and were of such a nature that, if proved or admitted, they could not disqualify him for his office, or amount to *inability* or *misbehavior*, within the meaning of the Act of Parliament. Upon such affidavits, we think that we should have been bound to grant a rule to show cause for a *quo warranto*, with a view to his being afterwards restored to his office, from which he had been illegally removed. We are to see that judges and functionaries vested with judicial authority do not exceed their jurisdiction. The chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principle of eternal justice, that he hears the party accused; he cannot legally act upon such an occasion without some evidence being adduced to support the charges; and he has no authority to remove for matters unconnected with inability or misbehavior in the office of county court judge. Where the party complained against has had a fair opportunity of being heard; where the charges, if true, amount to inability or misbehavior, and where evidence has been given in support of them, we think we cannot inquire into the amount of evidence or the balance of evidence, the chancellor, acting within his jurisdiction, being the constituted judge upon this subject."[1]

§ 886. Denying the Privilege of Cross-Examination. — The plaintiff, a member of the New York Stock Exchange, an unincorpo-

[1] Ex parte Ramshay, 18 Ad. & El. (N. S.) 172, 189.

rated voluntary association, having been charged by a sub-committee of investigation, after taking voluminous testimony, with being guilty of improper practices, — the governing committee of the Exchange, who were empowered by its constitution to expel members adjudged to have been guilty of obvious fraud, preferred charges against him based upon the testimony thus taken. He was permitted to make statements and explanations before the investigating committee, and to cross-examine the witnesses produced. He then appeared before the governing committee and read his defense at great length. At a subsequent meeting, which took place in his absence, two accusing witnesses were examined by the governing committee. The accused member thereafter applied to have these witnesses again brought before the committee, to the end that they might be cross-examined by him, which application the committee denied. It was held that the action of the committee, in allowing witnesses to testify without giving the accused an opportunity of cross-examination, was not just or fair to him, either in a legal or an equitable sense, and that the defendants should be *restrained*, pending the action, from asserting against the plaintiff the resolution of expulsion which they had passed upon him.[1]

§ 887. Right to an Opportunity to be Heard on an Ecclesiastical Appeal. — The Court of Queen's Bench has affirmed in strong language, the four judges being unanimous on the question, the proposition that, on an appeal to the Archbishop of Canterbury from a sentence of an ecclesiastical court, revoking the license of a curate, the appellant has a right to a fresh hearing, to the opportunity of tendering evidence in his own behalf, and of arguing the question of the propriety of the sentence which has been passed upon him. The judges concurred in the opinion that the archbishop might regulate the mode in which the proceeding at the hearing was to be taken; but they held that he could not, if so requested to hear, affirm or annul the revocation, merely upon the statements made by the curate in his petition of appeal, and the written documents referred to in such petition, — and they directed a *mandamus* to him, "to hear the said appeal and decide the merits thereof." Thus, the man of God found himself obliged to bow to the men of the law. Lord Campbell, C. J., said: "We have no discretion. No doubt the archbishop acted most conscientiously, and with a sincere desire to promote the interests of the church. But we all think that he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man shall be condemned without being heard. We do

[1] Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 38.

not say whether the archbishop's decision was right or wrong. We say only that he has not heard the petitioner. '*Qui statuit aliquid parte inaudita altera, æquum licit statuerit, æquus haud fuit.*' The legislature here gives an appeal from the bishop to the archbishop: that implies that the appellant is entitled to an opportunity of being heard. The appellant here has not been heard. In his petition he denies almost everything charged against him, specifically, and asks the archbishop to appoint a time and place at which he may be heard and adduce evidence in his behalf. Without any communication with him, his judge decides against him. There was not a hearing. The appellant should have had an opportunity of arguing, before the archbishop, that the bishop's decision was not correct upon the facts." The other judges expressed the same opinion, in language equally strong.[1] Where, however, in such a case, the appeal is *in writing*, and it is answered in writing by the persons appealed against, and the appellant replies in writing to that answer, and makes no request for a further hearing, it will be presumed that the appeal has been sufficiently heard.[2]

§ 888. Expulsion after an Acquittal and Without a Second Trial. — In an early case in Pennsylvania, it was provided by one of the by-laws of a corporation known as the Guardians of the Poor of the City of Philadelphia, that "no member to be expelled by a less number than *two-thirds of the members present*, the vote to be by ballot; provided, however, that no expulsion shall take place without giving the accused person notice in writing to attend the board, and answer the charges preferred against him, a copy of which shall be transmitted to him, which notice must be at least six days before the time appointed for the hearing." A number of charges, some of which, if made out, were sufficient to authorize an expulsion, were preferred against a member of the board. He was furnished with a copy of them, and was fully heard in his defense, at a special meeting called at his own request. Thereupon, a resolution, declaring that he had violated his duty as a guardian of the poor, was adopted by a *less number than two-thirds* of the members present. This, it was held, *amounted to an acquittal*, under this by-law; and the board having afterwards, at a stated meeting, passed a vote of expulsion by the constitutional majority, but without any *new accusation* or further hearing, — it was held to be illegal, and the expelled member was restored by *mandamus*. "There was no new

[1] Reg. *v.* Archbishop of Canterbury, 1 El. & El. 545, 559.

[2] Rex *v.* Bishop of Ely, 5 T. R. 475, as explained in Reg. *v.* Archbishop of Canterbury, 1 El. & El. 545, 560, 561. On the question of notice in other special cases, see Re Hammersmith Rent-Charge, 4 Exch. 87; Reg. *v.* Archbishop of Canterbury, 6 El. & Bl. 546.

charge," said Duncan, J., "no new specification; agreeable to the specifications preferred against him, no hearing of the cause *de novo;* no new defense, nor was the accused called in to make one. Thus he was twice put in jeopardy for the same offenses; condemned after he had been acquitted. It is very evident that new members attended and pronounced sentence, who had neither heard the evidence to support the charges, nor the defense of the accused, and whose votes produced a conviction. The accused was not apprised that he was again to be put on his trial. An opportunity might have been taken of a thin meeting, when his friends were absent, who would, perhaps, have been present had any notice been given of an intention to renew the inquiry. His enemies might have been notified, and attended with all their force, while his friends remained in total ignorance of so extraordinary and unprecedented a procedure. . . . Fairness and justice, due to all men, would have required, if he had been legally subject to a future trial, that, as he been acquitted of every violation of duty, at an assembly to which all the members of the corporation had been summoned, and a reconsideration was to take place, that all should have had an opportunity of attending and of voting." [1]

§ 889. **Expulsion after First Trial Which is a Nullity.**— But where the accused has been expelled by a judicature of a society, but under such circumstances as to make the expulsion a nullity, as where they proceeded against him without notice, without a formal complaint, without a trial, and in his absence, and when advised of the fact that it was a nullity, they annulled the proceeding and restored him to membership,—it was held that the first expulsion did not stand in the way of a second trial and expulsion for the same offense. The court, speaking through Lyon, J., reasoned thus: "Should a magistrate, on being told that a person had committed an assault and battery, enter in his docket a judgment convicting such person of that offense, and imposing a fine upon him therefor, without formal complaint, process, arrest, appearance or trial, such judgment would be a nullity, and would constitute no bar to a regular prosecution for the offense. The same principle applies here. The first void proceeding against the relator is no bar to a subsequent regular proceeding for the same offense." The court summarized what would be necessary to support the second conviction in such a case, thus: "If it appears from the relation that the relator was duly notified of the charge preferred against him, and had a fair trial before the board of directors; if the testimony tended to prove the charge; if the former proceeding against him for the same offense is a

[1] Com. v. Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 475.

nullity; and if the rule or by-law under which he was prosecuted, convicted and suspended from membership, is a valid regulation of the chamber,— then the relation fails to show that the relator is entitled to be reinstated.''[1]

§ 890. When Second Notice not Necessary.—Where a complaint had been made against a county court judge, to the chancellor of the Duchy of Lancaster by whom the judge had been appointed, and who, under a statute, possessed the power of removing him, and the complaint had been heard at a place appointed, and the judge had appeared personally by counsel, and had had an opportunity to make his defense, and did make a defense by affidavits, it was held that he was not entitled to a second notice before the sentence of removal was passed upon him. The fair inference which the court drew from the affidavits was that the inquiry was known to all parties to be finally closed, and that the chancellor only took time to deliberately review the evidence, and to consider of his judgment.[2]

§ 891. Incidents of the Notice and Its Service.—If the rules of the society require notice for a given number of days, a notice for a less number will not support the sentence, — as where the rules required fourteen days' notice and the notice was posted on the first of November, for a trial to be held on the fourteenth of November.[3] In the absence of any agreement by the member, or of any provision in the charter or by-laws, for a different mode of service, the notice should be served *personally*, or, if that can be dispensed with, then in such other mode as will be most likely to effect its object.[4] Where there is no statute prohibiting the business meetings of a society from being held on *Sunday*, a notice served on Sunday, warning the accused member to attend a trial appointed for the succeeding Sunday, is a good notice; for the rule of the common law which makes Sunday *dies non* in respect of judicial proceedings does not apply, and he cannot complain that he is cited and tried in conformity with rules by which he has agreed to abide.[5]

[1] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 682.

[2] Ex parte Ramshay, 18 Ad. & El. (N. S.) 172.

[3] Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346, 356.

[4] Wachtel *v.* Noah Widows' &c. Society, 84 N. Y. 28, 31; *s. c.* 38 Am. Rep. 478.

[5] People *v.* Young Men's &c. Society, 65 Barb. (N. Y.) 357. At common law, judicial proceedings only,

§ 892. Effect of Change of Residence in Connection with By-Law Requiring Members to Notify their Residence to the Society. — One of the by-laws of a benevolent society provided for giving written notice to any member in arrears six months for dues, calling his attention to the fact that he would be stricken from the roll, in case he did not pay his dues. Another by-law imposed a fine for an omission, by a member, to give notice to the association of a change of residence. At the time of joining, plaintiff's intestate gave notice of his then place of residence; he subsequently changed his residence, but did not give notice of the change. Because of failure to pay his dues, he was stricken from the rolls. No notice was given to him of an intention to strike him from the rolls, as provided by the by-laws. Afterwards the member died, and an action was brought by his administratrix to recover the sum provided by the defendant's by-laws to be paid on the death of a member. It was held that the plaintiff was entitled to recover; that the omission of the deceased to give notice of change of residence was no excuse for a failure to give him the prescribed notice.[1] The court said: "There is nothing to show that the object of the information as to residence was to enable the defendant to serve its notice at that place, or that the deceased agreed that they might leave it at his house. There are many other reasons why it would be well for such an association to know the residence of its members; but however that may be, the defendant, by another by-law, defined the penalty for neglect in giving notice of a change of residence. It declares that, for such omission, the member in default shall incur a fine of twenty-five cents. It would lead to a most unjust result, if there should be added a forfeiture of the whole benefit to which his representatives are, in case of his death, entitled. Such consequence is not declared, and cannot be implied for any legal construction."[2]

§ 893. Of the Corporate Tribunal and its Constitution. — As already seen with reference to corporations and to proceedings for the *amotion* of officers,[3] where the trial takes place before the corporation in its constituent character, or before a numerous tribunal, in the absence of a valid regulation otherwise

were prohibited on Sunday. Hence, judicial proceedings on Sunday are void, at common law. But all other business transactions are valid, except so far as prohibited by statute. Emott, J., in Merritt *v.* Earle, 81 Barb. (N. Y.) 38, 41.

[1] Wachtel *v.* Noah Widows' &c. Soc., 84 N. Y. 28; *s. c.* 38 Am. Rep. 478.

[2] Wachtel *v.* Noah Widows' &c. Soc., 84 N. Y. 28, 30; *s. c.* 38 Am. Rep. 478.

[3] *Ante*, § 725 *et seq.*

prescribing, *all the members* of the corporation, or the tribunal, must be *notified* to attend the meeting at which the trial is to be had.[1] It is therefore a good objection to the validity of the suspension, that a *single member* was not summoned and did not attend.[2] It is not necessary that all the members of the judicial body which hears the accusation should be *legales homines*, as in the case of a jury. It is not a good objection to a resolution of expulsion that one of them was *related* to a party to the controversy, nor that he had become familiar with the matter to be investigated, through conversations with the members or otherwise; since the rules of the common and statute law relating to judicial proceedings have but a limited application to voluntary societies.[3] It has been held that, while the body in its constituent capacity can not delegate the power of expelling a member to the board of directors, unless the power is conferred by charter or statute,[4] yet such power may be well exercised by the directors where there is a statute reposing it in them.[5] But this should, it seems,

[1] Rex *v.* Town of Liverpool, 2 Burr. 723, 731; Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 475; Loubat *v.* Le Roy, 15 Abb. N. C. (N. Y.) 14; Smyth *v.* Darley, 2 H. L. Cas. 789. See also People *v.* Batchelor, 22 N. L. 128.

[2] Loubat *v.* LeRoy, 15 Abb. N. C. (N. Y.) 14. In the same case, Van Vorst, J., at special term of the Supreme Court, rendered a very long opinion, in which he held that when the constitution of a voluntary association provides that expulsion or suspension must be by a *two-thirds vote* of its governing committee, the provision is satisfied by a two-third vote of a *quorum* as it existed at the time of the vote, although several of its members were not present. From this decision an appeal was taken to the general term. In rendering an opinion reversing the decision of the special term, Daniel, J., held, amongst other things, that as the governing committee was to consist of twenty-four members it would take sixteen affirmative votes to make the required two-thirds, and this although there were four vacancies on the committee. Davis, P. J., concurred in the reversal for other reasons, and did not express himself on this point. Brady, J., concurred in the result. 40 Hun (N. Y.), 546. And it has been said in a case where a member was tried and acquitted for want of a rulable two-thirds vote against him, that "a decent respect for the members who had voted for his acquittal, as well as a regard to impartial justice, required a general summons" to another meeting to reconsider the matter, even if a reconsideration could be lawfully had except on his motion or petition. Com. *v.* Guardians of the Poor, 6 Serg. & R. (Pa.) 469, 475.

[3] Loubat *v.* Le Roy, *supra.*

[4] State *v.* Chamber of Commerce, 20 Wis. 63, 73; Hassler *v.* Philadelphia &c. Assoc., 14 Phila. (Pa.) 233. *Ante*, § 803.

[5] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 686.

be confined to business corporations, in which the directors are merely a committee of members elected for the transaction of the corporate *business.* It is plain that in many corporations members may be expelled without a trial before the whole corporation, but upon a trial before some judicatory to which cognizance of offenses by members is committed. This will be seen especially in the case of *religious corporations,* — the well settled doctrine in respect of such corporations being, that where the judicatory appointed in accordance with the laws and usages of the corporation have acted upon a case within their jurisdiction, the judicial courts will not interfere.[1] The same rule applies in the case of *social clubs,* as seen from several instances in this chapter, and also in the case of *merchant's exchanges.*[2] Thus, in a case in New York, which has been frequently cited, a member of an incorporated body of merchants, organized, among other things, "to inculcate just and equitable principles in trade," was expelled, in pursuance of a *by-law,* by the *board of managers,* for obtaining goods of a person not a member of the corporation under false pretenses; and it was held that he was rightly expelled.[3] It is not a good objection in a collateral attack, that two of the *directors,* by whom the member was tried, were not *citizens* of the United States, or that two of them were *prejudiced* and not impartial triers.[4] Where the society has no rules prescribing by what judicatory or by what vote an accused member may be tried and expelled, the rule is, that he may be tried upon notice by the society at large, and expelled by the vote of a majority of all the members of the society.[5] Where the rules of the society require a two-thirds vote of the members present, in order to an expulsion, this means a two-thirds vote of the *visible quorum,* that is, two-thirds of all present, including those who do not vote. Those who do not vote may, therefore, by

[1] Watson *v.* Jones, 13 Wall. (U. S.) 679; State *v.* Hebrew Congregation, 30 La. An. 205; *s. c.* 33 Am. Rep. 217.

[2] Pitcher *v.* Chicago Board of Trade, 121 Ill. 412.

[3] People *v.* New York Commercial Asso., 18 Abb. Pr. (N. Y.) 271.

[4] Fitcher *v.* Chicago Board of Trade, 121 Ill. 412; *s. c.* 13 North East. Rep. 187; 11 West. Rep. 38; 2 Rail. & Corp. L. . J89.

[5] Inness *v.* Wylie, 1 Car. & K. 257, per Lord Denman C. J.; White *v.* Brownell, 2 Daly (N. Y.), 329, 359, per Daly, J.

their silence, turn the scale in favor of the accused. Thus, where there were present at the meeting 117 members, and 77 voted for expulsion and 38 against expulsion, and 2 did not vote at all, it was held that the resolution of expulsion had not been adopted by the requisite two-thirds majority.[1] It should be added that the return to a *mandamus* to restore the expelled member will be fatally defective, where it shows that he was tried by a select body less than the whole number of corporators, and does not show the source from which the select body derived their power or jurisdiction.[2] From what has already been said, that a conviction upon a trial by a jury under an indictment is not necessary to warrant an expulsion for an infamous offense,[3] it follows that the mere fact that the charge against the member is undergoing an investigation in a judicial tribunal, does not oust the corporate judicatory of their jurisdiction to try him upon the question of his expulsion; since, although he may be acquitted in the judicial court, he may be expelled by the corporate judicatory.[4] From the same consideration, it also follows that the constitutional guaranty of the right of *trial by jury* does not apply to proceedings taken by a corporation for the removal of a member for offenses against the corporation.[5]

§ 894. Illustrations: Expulsion by a Two-Third Vote. — Articles of partnership provided that it should be lawful for the holders of two-thirds or more of the partnership shares, for the time being, to expel any partner, by giving him notice thereof, under their hands, in the form thereby prescribed; and that, immediately after giving such notice, a notice of the dissolution as to the expelled partner should be signed by the partners and published, with power to any other of the expelling partners to sign the name of the expelled partner. It was provided that if a partner became bankrupt, insolvent or was expelled, his interest should cease as to profit and loss, as if he had died on the

[1] Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346, 353.

[2] Green *v.* African Methodist Episcopal Society, 1 Serg. & R. (Pa.) 254.

[3] *Ante*, § 859.

[4] Hurst *v.* New York Produce Exchange, 100 N. Y. 605, Mem.; *s. c.* in full 1 Cent. Rep. 206.

[5] People *v.* New York Commercial Association, 18 Abb. Pr. (N. Y.) 271. Manner of appointment of committee of investigation: appointment by second vice-president and subsequent appointments by the first vice-president, in the place of members declining to act, upheld as valid: People *v.* St. George's Society, 28 Mich. 261.

day of such bankruptcy, insolvency, or expulsion; and that the amount of his share should be ascertained and payment secured, by the same arrangement as would have been applicable in case of his decease. It was also provided that the shares of retired, deceased, bankrupt, insolvent or expelled partners should be disposed of in such way, either to or between some or all of the continuing partners, or by the admission of a new partner or new partners, as the holders of a majority of the shares should determine. The articles provided that, in the case of making certain arrangements, there should previously be a meeting of the partners in committee; but did not express that any such meeting should be necessary previous to the exercise of the power to expel. The article also provided for the adjustment of all the partnership accounts, within sixty days after the thirtieth of June in each year, when an inventory of all the stock, debts, etc., should be made, with proper allowances, so as to ascertain the partnership property, profit and loss, and the shares of the respective partners, which shares were to be carried to their respective accounts; and it was provided that the share of any partner who might wish to retire, if his retirement were consented to by the majority of the others, was to be taken by the continuing partners, at the amount at which the same stood at the time for making the yearly rest or statement next preceding; and that the surviving partners were, also, to take the shares of a deceased partner at the amount at which the same stood at such next preceding yearly rest or settlement. It was held that the power of expulsion by a partner might be exercised by two-thirds of the partners, *without any previous meeting* of the partners in committee upon the question, and *without any cause being assigned* for such expulsion; but that the power must be *exercised with good faith*, and not against the truth and honor of the contract; but that the power was not properly exercised at the exclusive instance of one partner, and in consequence of his representations to the other partners, made without the knowledge and behind the back of the partner who was to be expelled, and without giving to such partner the opportunity of stating his case and of removing any misunderstanding on the part of his copartners.[1] In giving his judgment on this case, the Vice-Chancellor (Sir W. Page Wood, afterward Lord Hatherley) said: "I have said before that I hold with the defendants, that they were competent to give a notice to dissolve, without assigning any reason; that they were competent to exercise that power, without holding any meeting with their copartners; but then the power must be exercised *bona fide*. Good faith is unquestionably of the essence of all contracts. Sir Fitzroy Kelly has said that I could not introduce any new words

[1] Blisset *v.* Daniel, 10 Hare, 493.

into this contract. The court does not do so, but the court pronounces in every contract, and, if there can be any difference, more especially in every contract of partnership, a basis of good faith, upon which all the stipulations contained in the deed must rest. This power would never be allowed to be exercised, by this court, in a manner against what I may call *the truth and honor of these articles*, borrowing an expression which has been applied to another description of contract. It is quite clear that this power was never intended to be exercised by any two-thirds of the partners merely and solely for their own exclusive benefit. If cause be shown, of course it removes all difficulty with reference to fraud, using that word according to the sense in which the court uses it; but if cause be not shown and proved, then it must be very clearly made out that the exercise of the power has been in good faith." [1] - - - - Where the rules of a club require the vote in regard to the expulsion of a member to consist of two-thirds of those present, and there were present at the meeting 117 members, two of whom did not vote, and the vote stood 77 for expulsion and 38 against it, — it was held that the resolution of expulsion had not been adopted by two-thirds of those present, 77 not being two-thirds of 117. In giving his judgment to this effect, Jessel, M. R., said: "When a resolution is put to a meeting, the persons present may take one of three courses. They may vote for or against it; or not wishing to express a positive opinion on the question, refrain from voting at all. This being so, those who do not vote may, by not doing so, turn the scale in favor of the accused member of the club. It was, therefore, the duty of the secretary, or scrutineer, to ascertain, first, how many persons were present when the question was put, and, secondly, how many of those persons had voted for the resolution; but no such course has been adopted in this instance. It appears to me, then, that this also is a fatal objection." [2]

§ 895. Jurisdiction of Standing Committee of Brokers' Board.— Where the constitution and by-laws of a voluntary society, called "The Open Board of Brokers," provided for a *standing committee*, who were to take cognizance of and exercise jurisdiction over all claims and matters in difference between members, and whose decision was to be binding upon them,— it was held that this committee was the proper tribunal to investigate and decide whether a member was or was not in default upon a contract, within the meaning of a by-law which made such a default a ground for suspension. It was further said: "When a

[1] *Ibid.* 522. [2] Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346, 354.

claim, therefore, is made by one member upon another, and he brings the matter in difference before this arbitration committee, and they, after having notified the other, and afforded him the opportunity of being heard, investigate the claim, and decide that the other party is in default,— that is . . . a 'due investigation,' within the meaning of the law. It never could have been the design of the by-law that the committee on membership are also to sit in deliberation upon the matter, and investigate it over again, before they are authorized to report to the president that the member is in default. It is due investigation on their part, when they inquire and ascertain that the arbitration committee, whose decision is binding and subject to review, have decided, in a matter legitimately before them, that a member is in default. A second investigation would be superfluous and was not . . . contemplated by the by-law."[1]

§ 896. Illustration.— A claim was made by a firm of brokers, who were members of a voluntary association called the "Open Board of Brokers," upon another member, charging him with default upon a contract which he had made with them. He denied the validity of their claim, and they cited him to appear before the arbitration committee of the board, to have the matter in dispute adjusted under the rules of the society. This he declined to do, protesting against the jurisdiction of the committee. They, thereupon, heard evidence, and found that he was in default upon the contract. The prosecuting member then made known to the committee on membership the decision of the committee on arbitration, and this latter committee, upon due investigation, reported to the president of the board that the plaintiff was in default upon his contract in question, upon which the president declared him suspended from his privileges as a member of the board. The plaintiff appealed from this act of the president to the executive committee, as he had a right to do under the by-laws, but before any decision upon his appeal, he brought an action to restrain the president and members of the board, by injunction, from interfering with him, "in the full and free exercise and enjoyment of all his rights, privileges and franchises," as a member of the body. Having thus appealed to the judicial courts, he refused to prosecute his appeal before the executive committee, and protested against the committee taking any action in the matter. On this

[1] White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162, 200; *s. c.* 2 Daly (N. Y.) 329.

state of facts, it was held that he was *not entitled to an injunction* to restrain the society from interfering with his rights as a member.[1]

§ **897. Of the Trial and the Evidence.** — The obligation to proceed upon inquiry, stated in a preceding section,[2] implies that no formal suspension or expulsion can take place without the hearing of *evidence* in support of the accusation.[3] But it is not necessary that the evidence should be of such a character as would be necessary to its admission in the judicial courts: it is sufficient if it be of that character on which men ordinarily act in their private affairs, so that nothing takes place which violates the principle of natural justice already stated. Unless the rules of the society otherwise provide, the witnesses need not be under oath.[4] The evidence may, it seems, be taken before one member of the court by a stenographer in the form of a deposition, and read before the whole court, at the trial, provided the accused have a fair opportunity of presenting his defense.[5] The facts on which the committee which constitutes the judicial body acts, may be collected by a sub-committee, and afterwards reported to the full committee, with whom the final decision rests.[6] Nor is it necessary that the accused should have notice of the time of the presentation of this report to the full committee, provided that he is afforded a fair opportunity of being heard before the full committee in his defense.[7] One case has condemned an expulsion which took place upon the testimony of a witness who would have been incompetent to testify according to the rules of evidence which obtain in the judicial courts; but its authority is doubtful, as the expulsion also took place in the absence of the accused and without notice to him,[8] — which was a more conclu-

[1] White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162; affirming *s. c.* 3 *Id.* 318.

[2] *Ante*, § 881.

[3] See in illustration of this, the case of Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346, 350, where the rules of the club required the committee to proceed after "inquiry," and the observations of Jessel, M. R., thereon.

[4] People *v.* New York Commercial Association, 18 Abb. Pr. (N. Y.) 271; Ex parte Ramshay, 18 Ad. & El. (N. S.) 172. It is hence no objection that a witness was *not properly sworn:* Pitcher *v.* Chicago Board of Trade, 121 Ill. 412; 13 Northeast. Rep. 187; 11 West. Rep. 38; 2 R. & Corp. L. J. 89.

[5] People *v.* Board of Police Commissioners, 20 Hun (N. Y.), 402.

[6] Loubat *v.* Leroy, 15 Abb. N. C. (N. Y.) 1. S. P. Pitcher *v.* Chicago Board of Trade, *supra.*

[7] *Ibid.*

[8] Washington &c. Soc. *v.* Bacher, 20 Pa. St. 425.

sive ground in support of the decision of the court. And finally, it should be said that in all proceedings for the expulsion of members of such an organization, the provisions of the *constitution* relating thereto must be *strictly followed out*, otherwise the expelled member will be entitled to relief in the judicial courts.[1]

§ 898. **Necessity of a Sentence of Expulsion.** — Except in those cases, chiefly in mutual benefit societies, which proceed on a principle analogous to mutual insurance, where the non-payment of dues after notice, *ipso facto*, works a forfeiture of membership,[2] the trial of the charges against the member is nugatory, except as an acquittal, unless it results in a formal sentence of expulsion. It is not meant, by this statement, to convey the idea that any particular form of sentence is required by the law. The idea is that there must be an actual expulsion, which must take place in form of a *corporate act*, declaring the member to be expelled.[3]

§ 899. **Right of Appeal.** — Where, by the laws governing the society, a right of appeal exists from the judicatory passing the sentence of suspension to a higher judicial body, or to the society at large, it will be a good ground of reinstatement that this right has been denied to the accused. And where a right of appeal was given by the constitution of the society, it was held that he was entitled to be reinstated, because this right had been denied him, although there was a by-law providing that the decision of the committee by which he had been suspended should be final. The reason was that where there is a by-law conflicting with the constitution of the society, the constitution and not the by-law, must prevail, and further, that the member ought not to lose his right of membership on a question of doubtful construction, especially as property rights were involved.[4] It has been held, but upon grounds which are certainly not obvious, that the protesting member of a mercantile exchange is entitled to an appeal

[1] Loubat *v.* Leroy, 15 Abb. N. C. (N. Y.) 1, 45 note.

[2] *Ante*, § 881.

[3] Com. *v.* Pennsylvania Beneficial Institution, 2 Serg. & R. (Pa.) 141; Com. *v.* German Society, 15 Pa. St. 251; *ante*, § 817.

[4] Powell *v.* Abbott, 9 Week. Notes Cas. 231 (Philadelphia Court of Common Pleas).

from its board of arbitrators to its board of appeals, on the mere question of jurisdiction, without submitting the whole merits of the controversy to the board of appeals, as he was required by the board to do, in order to have his appeal allowed.[1]

ARTICLE III. JUDICIAL PROCEEDINGS TO REINSTATE.

§ 904. Mandamus to Restore Member.— Ever since the decision of the Court of King's Bench in Bagg's Case,[2] and possibly long before, the writ of *mandamus* has been the usual and undoubted remedy to restore an officer of a *corporation* who has been unlawfully amoved,[3] or a member of a corporation who has been unlawfully suspended, expelled or

[1] Savannah Cotton Exchange *v.* State, 54 Ga. 668.

[2] 11 Co. Rep. 93, 99 (anno 1616).

[3] *Ante*, § 829.

otherwise disfranchised.[1] As already seen,[2] by the principles of the common law of England, the writ of *mandamus* extends only to the vindication of rights of a *public* nature; but as there pointed out, it is used in the United States to vindicate rights in *private* corporations. Accordingly, we shall hereafter see that it is constantly used to compel the directors or managers of such corporations to accord to their stockholders the privilege of *inspecting the corporate books*, at reasonable times and under reasonable conditions.[3] So, *mandamus* lies to restore a subscriber to the capital stock of a *joint-stock corporation*, who has been struck from the subscription list without notice; [4] to compel an incorporated *fire company* to readmit a member who has been unlawfully excluded from membership; [5] to restore a member of an incorporated *merchants' exchange*,[6] or of an incorporated benevolent [7] social,[8] scientific society.[9] According to a recent case in Cali-

[1] Rex *v.* Mayor &c. of Doncaster, Sayer, 37; Rex *v.* Mayor &c. Doncaster (a different case), 2 Ld. Raym. 1566; Prohurst's Case, Carthew, 168; Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. C.), 274; People *v.* Fire Department, 31 Mich. 458; Savannah Cotton Exchange *v.* State, 54 Ga. 668; Fuller *v.* Trustees, 6 Conn. 532; People *v.* Medical Society, 32 N. Y. 187, 192; People *v.* Medical Society, 24 Barb. (N. Y.) 572; Com. *v.* St. Patrick's Benevolent Society, 2 Binn. (Pa.) 441; *s. c.* 4 Am. Dec. 453; Green *v.* African Methodist Episcopal Society, 1 Serg. &. R. (Pa.) 254; Com. *v.* Pike Beneficial Society, 8 Watts & S. (Pa.) 247; Com. *v.* German Society, 15 Pa. St. 251; Black & White Smith's Society *v.* Van Dyke, 2 Whart. (Pa.) 309, 312; *s. c.* 30 Am. Dec. 263; People *v.* St. Franciscus Benevolent Society, 24 How. Pr. (N. Y.) 216; Sleeper *v.* Franklin Lyceum, 7 R. I. 523; Sibley *v.* Carteret Club, 40 N. J. L. 295. In Otto *v.* Tailors' &c. Union, 75 Cal. 308, 313, the remedy by *mandamus*, called in the code of procedure of that State "mandate," was held proper to restore a member of a voluntary *unincorporated* association who had been expelled without a proper trial; but this decision is quite out of line with the judicial authorities.

[2] *Ante*, § 829.

[3] *Post*, Ch. 87.

[4] Delacy *v.* Meuse River Nav. Co., 1 Hawks (N. C.), 274.

[5] People *v.* Fire Department, 31 Mich. 458.

[6] Savannah Cotton Exchange *v.* The State, 54 Ga. 668.

[7] People *v.* St. Franciscus Benevolent Soc., 24 How. Pr. (N. Y.) 216; Com. *v.* St. Patrick Benevolent Soc., 2 Binn. (Pa.) 441; *s. c.* 4 Am. Dec. 453; Green *v.* African Methodist Episcopal Soc., 1 Serg. & R. (Pa.) 254. See also Com. *v.* German Soc., 15 Pa. St. 251; Society &c. *v.* Commonwealth, 52 Pa. St. 125; Black & White Smiths' Soc. *v.* Vandyke, 2 Whart. (Pa.) 309; *s. c.* 30 Am. Dec. 263; Com. *v.* Pike Beneficial Soc., 8 Watts. & S. (Pa.) 247.

[8] Sibley *v.* Carteret Club, 40 N. J. L. 295.

[9] People *v.* Medical Society, 24 Barb. (N. Y.) 570; People *v.* Medical Society, 32 N. Y. 187.

fornia, "courts will interfere [by "*mandate*"] for the purpose of *protecting property* rights of members of unincorporated associations, in all proper cases, and when they take jurisdiction, will follow and force, so far as applicable, the rules applying to incorporate bodies of the same character." [1]

§ 905. Mandamus to Compel Corporation to Admit a Member. — As already pointed out,[2] the writ of *mandamus* was used at common law to compel a corporation to *swear* in an officer who had been duly elected or appointed to a corporate office. On analogous principles, if the charter of a corporation is such that a person possessing a given qualification has a *right* to become a member of it, he may have a *mandamus* to compel the corporation to admit him in case they refuse. Thus, where a licensed physician, having the qualifications which, under a statute of New York, entitled him to become a member of a certain medical society, was refused membership, on the alleged ground that he had at some time been guilty of acts of empiricism, by advertising in the public journals, etc., — it was held that the code of medical ethics, adopted by the society, applied to members only; that it could have no application to one who had not been a party to it, and consequently, that the society should be compelled by *mandamus* to admit the relator.[3] Speaking upon this question, Porter, J., used the following language: "When a party, having a clear presumptive title, applies to be admitted to the exercise of a corporate franchise, the application should not be denied, unless the right of immediate expulsion be plain and unquestioned. The general policy of the law is opposed to sharp and summary judgments, where the party whose rights are in jeopardy has no opportunity to be heard in his own defense." [4] On the other hand, it has been held that the jurisdiction of a representative body, composed of members selected by, and delegated to it by other bodies, to judge of the qualification and election of its members, is a power necessarily incident to bodies of such com-

[1] Otto *v.* Tailors' &c. Union, 75 Cal. 308, 313, opinion by Searls, C. J.

[2] *Ante*, § 829.

[3] People *v.* Med. Society, 32 N. Y. 187. Compare People *v.* Medical Society, 24 Barb. (N. Y.) 570.

[4] People *v.* Medical Soc., 32 N. Y. 187, 196; citing Bagg's Case, 11 Co. Rep. 99.

position. In most instances, the investigation must be summary in its proceedings, and in the absence of statutory provisions, or regulations by by-laws, is discretionary in the mode of procedure. Thus, the Medical Society of New Jersey, incorporated by act of the legislature, was composed of delegates chosen by and from each of the district or county societies, instituted by its authority. In the county of H., two separate organizations were maintained, each claiming to be District Medical Society of the county of H. Two sets of delegates, chosen by their organizations, appeared and claimed admission as members of the State Society. It was *held* that it was competent for the State Society, in determining the election of its members, to ascertain and decide which of the organizations was the district society, and that the facts might be ascertained through the medium of a *committee*.[1]

§ **906. The Return.**— What has been said in a former chapter concerning the use of the writ of *mandamus* to restore an *officer* who has been unlawfully *amoved*,[2] may be usefully read in connection with what is said in this chapter on the same subject; and perhaps the use of this writ in both connections might better have been treated together. As there pointed out, by the ancient common law, the rule in respect of the return to the writ of *mandamus* was the same as in the case of a sheriff's return; it could not be contradicted, and, if it were false, the only remedy of the relator lay in an action for damages for a false return.[3] This fact of the conclusiveness of the return led the courts to great strictness in requiring the return to set out all the facts on which the respondents justified their action, and this rule has been continued, with little deviation, to the present time, even in those courts where, as now in England, the ancient rule is abolished, and the return may be

[1] State *v.* Medical Society &c., 38 N. J. L. 377. A merely inadvertent omission to sign the by-laws and constitution adopted by a corporation, will not invalidate a membership that has been asserted by a party claiming it, and distinctly recognized and acquiesced in by the corporation, for a long period of time, without any objection. State *v.* Sibley, 25 Minn. 387.

[2] *Ante*, § 829, *et seq.*

[3] Bagg's Case, 11 Co. Rep. 93, 99. This rule continued in Pennsylvania down to the time of the decision of Green *v.* African Methodist Episcopal Society, 1 Serg. & R. (Pa.) 254, and perhaps later.

traversed in the same proceeding. "It is certainly true," said Lord Mansfield, "that, where an amotion is concerned, the return must set out all the necessary facts precisely, to show that the person is removed in a legal and proper manner, and for a legal and proper cause. It is not sufficient to set out conclusions only; they must set the facts themselves out precisely, that the court may be able to judge of the matter. And so it is also, as to the *cause* of amotion. *This* must be set out in the same manner, that the court may judge of it." [1] Although, as already pointed out,[2] this rule was changed by statute in the reign of Queen Anne,—this doctrine, that the return must set forth distinctly the fact and also the cause of the amotion, suspension, expulsion, or other disfranchisement, of the relator, is reiterated in several modern cases.[3] The rule still obtains under the modern practice, to the extent that the return to such a *mandamus* must distinctly set forth all the facts authorizing the amotion, in order that the court may judge of its sufficiency, both as to the cause and the form of the proceedings. Thus, where the charter of a corporation provided that, on the conviction of a member upon certain charges "on the deposition of two or more credible witnesses" he should be expelled, the return to a *mandamus* to restore such member was held insufficient for not stating that at least two witnesses were heard in support of the charge, and that the same was either proved or confessed.[4] In an old case where the *mandamus* was sought to restore the relator to the office of capital burgess, from which he had been amoved, the return was that, as a chamberlain of the borough, he obstinately and voluntarily refused to obey several orders and laws made for the good of the borough, contrary to the duties of his office. This was held *in-*

[1] Rex *v.* Town of Liverpool, 2 Burr. 723, 731; *s. c.* 2 Esp. 324.

[2] *Ante*, § 833.

[3] Green *v.* African Methodist Episcopal Society, 1 Serg. & R. (Pa.) 254; Com. *v.* German Society, 15 Pa. St. 251, 255; Sleeper *v.* Franklin Lyceum, 7 R. I. 523. The ancient rule continued in Pennsylvania long after it had been abolished in England. Thus it was said by Tilghman, C. J., in a case decided in the year 1815, "Those who make a return to a *mandamus*, have this great advantage that their proceedings cannot be contradicted in the proceedings on the *mandamus*, although if it be false they are liable to an action." Green *v.* African Methodist Episcopal Soc., 1 Serg. & R. (Pa.) 254.

[4] Com. *v.* German Soc. 15, Pa. St. 251.

sufficient, as the several orders and laws should have been set forth specifically.[1] In another case it was held that a general charge, in such a return, of neglect and omission of duty in the officer who had been removed from his office was insufficient.[2]

§ **907. Practice under the Writ.** — What has already been said under this head in the preceding chapter,[3] may be usefully referred to here; and it should be borne in mind that questions of practice are to be referred to rules which obtain in each local jurisdiction. It has been held, in respect of the use of the writ of *mandamus* in this connection, that, in order to enable the corporation to set out specifically in its return the ground of its action, the writ may be ordered to issue in the *alternative*, commanding the corporation either to restore the applicant to his rights of membership, or to show good cause to the contrary;[4] and this is believed to be the usual practice.

§ **908. Visitorial Powers Exercised by the Courts.** — It is said in Wisconsin, by Mr. Justice Lyon, speaking for the court: "The visitorial or superintending power of the State over corporations, created by the legislature, will always be exercised, in proper cases, through the medium of the courts of the State, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises. To this end, the courts will issue writs of *quo warranto*, *mandamus*, or *injunction*, as the exigencies of the particular case may require; will inquire into the grievance complained of, and, if the same is found to exist, will apply such remedy as the law prescribes. Every corporation of the State, whether public or private, civil or municipal, is subject to its superintending control, although in its exercise, different rules may be applied to different classes of corporations."[5]

[1] Rex *v.* Mayor &c. of Doncaster, 2 Ld. Raym. 1566.

[2] Rex *v.* Mayor &c. of Doncaster, Sayer, 37.

[3] *Ante*, §§ 839, 840.

[4] Sleeper *v.* Franklin Lyceum, 7 R. I. 523.

[5] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 671, 679. The court referred to State *v.* Chamber of Commerce, 20 Wis. 63, and Dickenson *v.* Chamber of Commerce, 29 Wis. 45, as instances of the exercise of this jurisdiction in the case of members expelled or threatened with expulsion. The court also took occasion

§ **909. Remedy by Injunction.**— Where the rule in respect of injunction, which denies a resort to this remedy where the complainant has an adequate remedy *at law*, has not been modified by statute or by judicial decisions, it logically follows that as an officer or member of a corporation who has been unlawfully removed, suspended, expelled, or otherwise disfranchised, has a remedy by *mandamus* to effect his restoration, that is, a remedy at *law*, he cannot resort to the equitable remedy by injunction. But the strictness of this rule is considerably broken into in several American jurisdictions, either by force of statute or by the course of judicial decisions, so that now it frequently happens that relief by injunction is awarded, even when applied for by an officer or a member of a corporation.[1] In one American jurisdiction the remedy by injunction has been denied, on the doubtful ground that an injunction does not issue to undo what has been done, but only to avert threatened injuries, and that it therefore will not issue to *restore* a member of a corporation who has been expelled, — proceeding upon the view that the remedy of the complainant, if any, is at law.[2] In Pennsylvania a remedy by injunction is accorded, on the ground that, "a writ of *mandamus* would not secure to the plaintiff the protection which he seeks. The object of that writ would be to

to deny the doctrine of People *v.* Board of Trade, 80 Ill. 134, where the Supreme Court of Illinois substantially decided that the power of the Chicago Board of Trade to enact by-laws for its own government was unlimited, and that the court would not interfere with any by-law thus enacted, or revise any proceeding thereunder. The court said: "The case seems in conflict with earlier decisions of that court, and we are not aware that the court has re-asserted any such doctrine, although it has since considered several cases involving the legality of the proceedings of the same Board of Trade. See Fisher *v.* Chicago Board of Trade, 80 Ill. 84; Sturges *v.* Same, 86 Ill. 441; Baxter *v.* Same, 83 Ill. 146. True, these were equity cases, in which the respective complainants sought to restrain the board from expelling them, or to compel it to restore them after expulsion; yet the doctrine of the People *v.* Board of Trade, 80 Ill. 134, is referred to hypothetically in the opinions of the court, and no mention whatever is made of that case. Whether that learned and able court adhere to that doctrine or not, we are unable, as at present advised, to adopt it as the law of this court."

[1] Dickenson *v.* Chamber of Commerce, 29 Wis. 45. See also Tipton Fire Co. *v.* Barnheisel, 92 Ind. 88.

[2] Baxter *v.* Chicago Board of Trade, 83 Ill. 146; Sturges *v.* Chicago Board of Trade, 86 Ill. 441; Pitcher *v.* Chicago Board of Trade, 121 Ill. 412.

restore him to his rights as a member, if he had been improperly suspended. In the meanwhile there might be a threatened sacrifice of his property, as complained of by him."[1] This was well said; and in considering whether the remedy at law is in such a case adequate, it should be remembered that a preliminary injunction operates as an immediate restoration of the complainant to his rights of membership, which restoration continues *pendente lite;* whereas, if he is driven to a *mandamus*, he is not restored until the final judgment, which may not take place until years have elapsed, in an appellate court of last resort. In the meantime, if the corporation from which he has been expelled is a chamber of commerce, merchants' exchange, brokers' board, or other like society, he is deprived, pending the litigation, of the privilege of trading on its floor as a member, which, as is well known, is in many cases a privilege of great value — indeed indispensable to some merchants and brokers. Nor does the view of the Illinois court seem to be sound, in so far as it proceeds upon the ground that it is not the office of an injunction to undo what has already been done. For the theory of the law is that if the member has been unlawfully suspended or removed, the sentence of suspension or expulsion is *void*, and he is still a member. In such a case, the true office of the injunction is to restrain the corporation, its officers, agents and servants, from interfering in the future with his rights as a member.[2]

§ 910. Injunction in Case of Unincorporated Societies. — In certain subordinate courts of New York, the ancient distinction is taken that, while *mandamus* is the proper remedy where the party aggrieved seeks a restoration to membership in a *corporation*,[3] yet where the society is *not incorporated*, the remedy is by suit, that is, by an action for an order of restoration, tantamount to a proceeding by injunction.[4] And

[1] Powell *v.* Abbott, 9 Week. Notes Cas. (Pa.) 231 (Philadelphia Court of Common Pleas).

[2] Upon this ground the St. Louis Court of Appeals affirmed a decree against the Chamber of Commerce of St. Louis and its directors, in a proceeding by injunction instituted by a member who had been suspended for the non-payment of a fine illegally imposed. Albers *v.* Merchants Exchange, March, 1890, not yet reported.

[3] People *v.* New York Benevolent Society, 3 Hun (N. Y.), 361.

[4] Fritz *v.* Muck, 62 How. Pr. (N. Y.) 69.

this brings us to the statement that the usual relief, where members of *unincorporated* clubs or other societies are unlawfully suspended or expelled, is by an injunction in a court of equity.[1] In Pennsylvania, injunctions are granted to restore members who have been illegally expelled from voluntary associations, because chancery jurisdiction to control unincorporated societies or associations has been created in that State by statute.[2]

§ 911. Injunction in Case of Religious Societies.—It should also be observed that, in the case of *religious societies*, where a church or other religious congregation breaks into factions, owing to differences of doctrine or other causes, and there is a struggle between the factions for the possession of the church edifice or other temporalities, the usual and regular remedy is in a court of equity, whose procedure alone is sufficiently flexible to deal with such an extraordinary matter.[3] The wrongful and violent seizure of the edifice and property belonging to a church of a congregational form of government, by a minority of the members, contrary to the wishes of the majority, the deposition of the officers of the church and the trustees who hold the property, and the retention and use thereof by the minority to the exclusion of the majority, furnish good grounds for equitable relief.[4] In such a case a court of

[1] Fisher *v.* Keane, 11 Ch. Div. 353; Labouchere *v.* Earl of Wharncliffe, 13 Ch. Div. 346; Dawkins *v.* Antrobus, 17 Ch. Div. 615; Lambert *v.* Addison, 46 L. T. (N. S.) 20, 24; Leech *v.* Harris, 2 Brewst. (Pa.) 571, 576 (jurisdiction created by statute). In Dawkins *v.* Antrobus, *supra*, the propriety of the remedy by injunction in such cases is conceded. In Lambert *v.* Addison, *supra*, Kay, J., said: "The jurisdiction of the court in cases of this kind is undoubted, and I think the limit of that jurisdiction has been carefully defined. If the committee of a club having the power to expel a member, exercise their power in good faith and legally, the court has no power to interfere by an injunction to restrain them. If they exercise their power illegally, then the court has jurisdiction to interfere."

[2] Pennsylvania Act of June 16th, 1836; Leech *v.* Harris, 2 Brewst. (Pa.) 571, 576.

[3] Bouldin *v.* Alexander, 15 Wall. (U. S.) 131; Bates *v.* Houston, 66 Ga. 198; Brunnenmeyer *v.* Buhre, 32 Ill. 183; Roshi's Appeal, 69 Pa. St. 462; Kerr *v.* Trego, 47 Pa. St. 295; Lutheran Evangelical Church *v.* Gristgau, 34 Wis. 328, 336; Gable *v.* Miller, 10 Paige (N. Y.), 627. But see Lutheran Church *v.* Maschop, 10 N. J. Eq. 57; Baptist Church *v.* Witherell, 3 Paige (N. Y.), 296, (overruled, it seems, by Gable *v.* Miller, *supra*).

[4] Bates *v.* Houston, 66 Ga. 198; *s. c.* 9 Am. Corp. Cas. 47. See also Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.

equity will determine, upon the proofs, who are the trustees of the church, entitled to the possession of its temporalities.[1] The trustees are those who have been regularly constituted such: persons elected by a portion of the congregation at a meeting other than a regular meeting are not such trustees. Where a person conveys land in fee to trustees for the use of such a religious society, the trustees named in the deed are not removable at the will of the members of the society, and without cause shown.[2] Acquiescence *of* the *society or club* in the resolution of expulsion passed by its governing committee, affords no reason, it has been said, for the approval of the proceeding, or for the acceptance of the result by a judicial court when appealed to by the expelled member. Nor is he to suffer disadvantage because his fellow members do not call a special meeting to reconsider the resolution of expulsion. He was not bound to ask for such a meeting.[3] Where the society is a *partnership*, so that the expelled member has, in the strict sense, property rights therein, he is entitled to the protection of a court of equity in respect of those rights. If he is expelled from the society, it is within the power of such a court to inquire into the *reasonableness and propriety of* the action of the association, and to grant appropriate relief in the premises.[4]

§ 912. Member must first Exhaust his Remedy Within the Society.— Courts of equity uniformly deny their relief, in the cases spoken of in the preceding section, unless the complaining member has first exhausted his remedies within the society.[5] Thus, if an appeal is given from the judicatory which has passed the sentence of suspension or expulsion, either to a higher judicatory or to the association at large, he cannot appeal to a court of equity until he has prosecuted such appeal, unless it has been denied him;[6] or unless, by evasions, intentional delays,

[1] Bouldin *v.* Alexander, 15 Wall. (U. S.) 131.

[2] Bouldin *v.* Alexander, *supra.*

[3] Loubat *v.* Leroy, 15 Abb. N. C. (N. Y.) 1, 41.

[4] Olery *v.* Brown, 51 How. Pr. (N. Y.) 92.

[5] Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; White *v.* Brownell, 2 Daly (N. Y.), 329, per Daly, J.; *s. c.* 4 Abb. Pr. (N. S.) (N. Y.) 162.

[6] Carlen *v.* Drury, 1 Ves. & B. 154; White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.) 162, 199; *s. c.* 2 Daly (N. Y.), 329; Lafond *v.* Deems, 81 N. Y. 507; Loubat *v.* Leroy, 40 Hun (N. Y.), 546,

or other unjust procedure, he is deprived of the benefit of any further remedy given him by the constitution and by-laws of the society.[1] He must, it seems, first petition the governing body to reconsider its action, and to reinstate him before he can appeal to the judicial courts.[2] If the society is a subordinate lodge of a benevolent organization, and the suspended member fails to take an appeal to the grand lodge, which the laws of the order give him, the validity of his suspension cannot be collaterally inquired into in the judicial courts.[3] So, if he die during the suspension under such circumstances, his benefit certificate being forfeited by the suspension, the beneficiary cannot sustain an action thereon.[4] So, a contest between two factions of a subordinate lodge, touching the property of the lodge and the use of the name of the lodge, cannot be determined by the judicial courts, on a bill in equity or otherwise, until the complaining parties have exhausted their remedy by appealing to the grand lodge.[5] But where the laws of the society provide for no tribunal to pass upon the question of the liability of the society to a member, he may appeal directly to the judicial courts.[6]

§ 913. Injunction not Granted to Restrain Proceedings before Corporate Judicatory. — It follows from what has been said that a court of equity will not restrain such a body,—here the New York Produce Exchange,— or its managers and committees, from *proceeding with the investigation* of a complaint against a member of a nature to be within their jurisdiction, in advance of any action of theirs violating the rights of the accused member, and merely because he apprehends that they will act oppressively, or are intending to force him to arbitrate a controversy on which he desires the judgment of a court, or to suspend or expel him without cause. The presumption is that they will proceed reasonably and justly. Upon this question it is said: "It matters not whether this court or any other court is of the opinion that the com-

549; *s. c.* 15 Abb. N. C. (N. Y.) 1, 42; Karcher *v.* Supreme Lodge, 137 Mass. 368.

[1] White *v.* Brownell, 4 Abb. Pr. (N. S.) (N. Y.), 162, 199; *s. c.* 2 Daly (N. Y.), 329. Circumstances where an appeal was not required: Loubat *v.* Leroy, 40 Hun (N. Y.), 546; *s. c.* 15 Abb. N. C. (N. Y.) 1, 42.

[2] Loubat *v.* Leroy, 40 Hun (N. Y.), 546; *s. c.* 15 Abb. N. C. (N. Y.) 1, 42.

[3] Karcher *v.* Supreme Lodge, 137 Mass. 368.

[4] *Ibid.*

[5] Chamberlain *v.* Lincoln, 129 Mass. 70.

[6] Dolan *v.* Court Good Samaritan, 128 Mass. 437.

plaint was well or ill founded. It may have been entirely trivial and causeless, but it was one which Cathcart [the accusing member] could make, and which the complaint committee and the board of managers had the right to entertain and examine. It cannot be assumed that they would make an unjust, arbitrary or wrong decision. The presumption is that the board of managers, composed of impartial men, acquainted with business practices and the standards of commercial honor, would decide the question fairly and dismiss the complaint if it was made from improper motives and without sufficient cause."[1] When, therefore, the committee had the power of expulsion "in case the conduct of any member, either in or out of the club house, shall, in the opinion of the committee, be injurious to the character and interests of the club, the committee shall be empowered to recommend such member to resign," etc., it was held by the same eminent equity judge, that the question for decision was not whether the conduct of the member was *really* injurious, but whether it was injurious in the opinion of the committee; for "then all that the court requires is that the committee should form their opinion in a *bona fide* way. There is no power in this court to control the judgment or opinion of the committee."[2] Another statement of the rule was made by Brett, L. J., in a more recent case involving the question. He said: "The only question which a court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions which the court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club,— in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has acted contrary to the rules of the club, and thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of these charges can be made out by those who come before the court, the court has no power to interfere with what has been done."[3] It has been reasoned in the same strain, that the judicial courts are no places to review *routine questions* as to the regularity of a committee appointed to investigate charges against an expelled member. The relator having been before a committee claiming to be regular, and not shown to be otherwise, should have made his formal objections there; and it will be presumed that, if the proceedings before the committee were not according to the usages

[1] Hurst *v.* New York Produce Exchange, 100 N. Y. 605, mem.; *s. c.* in full, 1 Cent. Rep. 260, opinion by Earl, J.

[2] Richardson-Gardner *v.* Fremantle, 24 L. T. (N. S.) 81.

[3] Dawkins *v.* Antrobus, 17 Ch. Div. 615, 630.

of the society, they would not have been sanctioned by the society.[1] In Wisconsin, it has been regarded as doubtful, to say the least, whether in such a case the court will *look into the testimony* for such a purpose, though the question was not decided.[2] In like manner, it has been said by an eminent American judge: "Voluntary bodies of this kind will be held to the fair and honest administration of the rules which are in force when any proceeding is instituted against a member; but where the member is expelled in conformity with the rules, and proceedings are regular and in good faith, it is final, and no judicial tribunal can interfere."[3] "We have to consider," said Cotton, L. J., "first, whether the action of the committee and of the general board was authorized by any rule, that is to say, whether it was within the terms of the rule, and whether it was regular; and, secondly, if these questions are answered adversely to the appellant, whether it has been made out to the court that the proceedings were not in the *bona fide*, honest exercise of the powers given by the rule, but maliciously and fraudulently."[4] In a case in New York, the court reason that, in the case of an unincorporated mining stock board, not a joint-stock company within the statutes of the State, but to be regarded as a mere voluntary association, a membership cannot be regarded as a franchise; and that, this being so, in order to enable a member threatened with suspension to appeal to equity for an injunction, he must show that the proceedings of the board, or of the quorum of the board of which he complains, were *fraudulent or corrupt*, or the result of a *fraudulent conspiracy* to deprive him of his rights in the board.[5] It is believed that there is no substantial difference — at least in the conception of American courts — between the case where the remedy is sought in *equity* by an *injunction*, and the case where it sought at *law* by a *mandamus*, in respect of the principles upon which relief is accorded or denied; though the judicial expressions of the principle differ somewhat. It is said in Pennsylvania, in a proceeding by *mandamus*, that "the courts entertain a jurisdiction to preserve these tribunals [meaning corporations or the judicatories of corporations] in the line of order, and to correct abuses; but they do not inquire into the merits of what has passed *in rem judicatam*, in a regular course of proceedings."[6]

[1] People *v.* St. George's Society, 28 Mich. 261.

[2] State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 682.

[3] White *v.* Brownell, 2 Daly (N. Y.), 329, 359, per Daly, J.

[4] Dawkins *v.* Antrobus, 17 Ch. Div. 615, 633.

[5] Rorke *v.* Russell, 2 Lans. (N. Y.) 244, Ingraham, J., dissenting.

[6] Com. *v.* German Soc., 15 Pa. St. 251, 255; Com. *v.* Pike Beneficial Soc., 8 Watts & S. (Pa.) 247, 250. See also Black & White Smiths' Soc. *v.* Van Dyke, 2 Whart. (Pa.) 309; *s. c.* 30 Am. Dec. 263. Leech *v.* Harris, 2 Brews. (Pa.) 571.

§ 914. Principles on which Courts Proceed. — Courts of equity entertain a jurisdiction in the case of voluntary unincorporated societies, to hold such societies or their judicatories, in dealing with their members, within the lines of their constitutions, by-laws or other regulations, and to see that they exercise their powers *fairly and in good faith;* but they do not inquire into the merits of what has passed *in rem judicatam*, in the regular course of their proceedings.[1] It is but another statement of this principle to say that courts of equity do not sit as courts of *appeal* from such societies or their judicatories in such cases.[2] Nor will they interfere with their decisions on the mere ground that they are deemed *unreasonable.*[3] On the other hand, the courts will not interfere to *enforce the decrees* of the judicatories of self-constituted societies,[4] even where property rights are involved.[5] Courts of law have frequently applied the same

[1] Leech *v.* Harris, 2 Brewst. (Pa.) 571, 576; Com. *v.* Pike Beneficial Society, 8 Watts & S. 247; Black & White Smiths' Society *v.* Vandyke, 2 Whart. (Pa.) 309; *s. c.* 30. Am. Dec. 263; Society for the Visitation of the Sick *v.* Com., 52 Pa. St. 125; Rorke *v.* Russell, 2 Lans. (N. Y.) 244; Powell *v.* Abbott, 9 Week. Notes of Cas. (Pa.) 231 (Philadelphia Court of Common Pleas); Hutchinson *v.* Lawrence, 67 How. Pr. (N. Y.) 39, 41; Richardson-Gardner *v.* Fremantle, 24 L. T. (N. S.) 81; Hopkinson *v.* Marquis of Exeter, L. R. 5 Eq. 63; Burt *v.* Grand Lodge, 44 Mich. 208; White *v.* Brownell, 2 Daly (N. Y.), 229, 359; Manby *v.* Gresham Life Assurance Society, 29 Beav. 439, 445; Blisset *v.* Daniel, 10 Hare, 493; Dawkins *v.* Antrobus, 17 Ch. Div. 615. See also People *v.* New York Cotton Exchange, 8 Hun (N. Y.), 216; State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670, 682 (doubted whether the court will look into the evidence on which the society acted). In Otto *v.* Tailors' &c. Union, 75 Cal. 308, 314, which was a proceeding by "mandate" corresponding to *mandamus*, it was laid down that courts have no right to interfere with the decisions of voluntary societies except in the following cases: 1. If the decision arrived at was contrary to natural justice, such as the member not having an opportunity to explain his conduct. 2. If the rules of the society have not been observed. 3. If the action of the society was malicious and not *bona fide.* These conclusions are well supported by several of the preceding cases. The same principle is pursued by courts of equity, in exercising their visitorial power over charitable corporations. Thus, Lord Eldon restored a schoolmaster who had been removed by a corporation through what was an abuse of their discretion, if not a corrupt exercise of it. Dummer *v.* Corporation of Chippenham, 14 Ves. 245, 252, 253.

[2] Dawkins *v.* Antrobus, 17 Ch. Div. 615, 634.

[3] *Ibid.*

[4] Lloyd *v.* Loaring, 6 Ves. 773.

[5] Austin *v.* Searing, 16 N. Y. 112. There are cases which go to the length of holding that the judicial courts will not interfere under any circumstances. People *v.* Board of Trade, 80 Ill. 136

principle, in dealing with incorporated societies. If a member has been expelled according to the regular course of the proceedings of the society, as laid down by its rules, and without a deprivation of any of the rights stated in preceding sections, the courts will not, in a proceeding by *mandamus*, inquire into the merits of the sentence of expulsion.[1] The same principle is applied in courts of law, where an expelled member of a benevolent society brings an action to recover allowances granted to disabled members,[2] or where the member has died during the period of suspension, and the beneficiary named in his benefit certificate brings an action thereon against the society.[3] On the same principle, it has been reasoned that the judicial courts will not review the routine questions which may arise in proceedings to investigate charges against a member, — as, for instance, the regularity of the appointment of a committee.[4]

§ 915. **Further of this Subject.** — In such proceedings, the courts *conclusively presume* that the member *knows* the obligations resulting from the *charter*,[5] the *by-laws*,[6] or other *rules* of the society.[7] They will not, therefore, grant equitable relief on the ground of the *mistake* of both parties, as to the construction of the charter.[8]

§ 916. **Contract to Exercise Judgment Bona Fide.** — The principle of all these decisions is, that when a man joins a *club* he enters into a contract with other members of the club, to be governed by certain existing rules of the club and by rules established in a certain prescribed manner; and where a rule of the club exists, allowing a given majority of the members, or of the governing board of the club, to expel him upon a conclusion arrived at by them that his expul-

(denied in State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670); State *v.* Grand Lodge, 8 Mo. App. 148, 153. But the weight of authority is as stated in the text.

[1] Com. *v.* Pike Beneficial Society, 8 Watts & S. (Pa.) 247, 250; Com. *v.* German Society, 15 Pa. St. 251, 255 (recognized).

[2] Black & White Smiths' Society *v.* Van Dyke, 2 Whart. (Pa.) 309; *s. c.* 30 Am. Dec. 263.

[3] Karcher *v.* Supreme Lodge, 137 Mass. 368.

[4] People *v.* St. George's Society, 28 Mich. 261.

[5] Chesapeake &c. Canal Co. *v.* Dulany, 4 Cranch C. C. (U. S.) 85.

[6] Palmyra *v.* Morton, 25 Mo. 593; *post*, § 941.

[7] Raggett *v.* Musgrave, 5 Car. & P. 556.

[8] Chesapeake &c. Canal Co. *v.* Dulaney, *supra*.

sion is required by the interest of the club, this amounts to nothing more than a contract with him, on the part of the other members of the club, that the club or the governing committee, in deciding upon the question of his expulsion, may exercise their judgment *bona fide;* and where they exercise their judgment *bona fide*, a court of justice cannot interfere, although they may plainly exercise it *wrongly*. The reason is plain. They, by their contract, have appointed a certain tribunal, whose judgment is to be exercised and is to be conclusive. If a court of justice substitutes in the place of the judgment of this tribunal its own judgment, does it not make a new and different contract for the parties from the one which they have made for themselves? A very apt illustration of the principle is found in a case decided by that learned and experienced judge, Sir John Romilly, M. R., in 1861. A bill in equity alleged that the plaintiff effected a life policy in the office of the defendant company, at an extra premium, and that by the prospectus, the life might, from time to time, be re-examined, and the "society being satisfied" of the removal of the cause for charging the extra premium would reduce it. The directors having *bona fide* exercised their discretion, refused to revise the premium. It was held, on demurrer to a bill, that the court could not interfere in favor of the plaintiff, although the assured had become "thoroughly healthy and sound." The Master of the Rolls said: "If the defendants have erroneously exercised their judgment in this case, I regret that the plaintiff can have no redress; but I think it is impossible for this court to interfere with the judgment of the directors, *bona fide* exercised. According to the contract alleged, the society contract that they will, in a certain event, namely, of the improvement of the life of the assured, exercise their judgment *bona fide;* and if they should be of opinion that it is proper, they will reduce the premium to that on an ordinary life. The plaintiff says, that he has furnished the directors with evidence that the assured is now in perfect health, but they are not satisfied of the fact. The defendant's case is, that they had, *bona fide* exercised their judgment, and are of opinion that the plaintiff has not fulfilled the condition. Thus the plaintiff says he has, while they say he has not. It is impossible for this court to hold that the directors have exercised their judgment erroneously, and to exercise it in their place. The contract being that the directors will, *bona fide*, do what is right between the insurer and the shareholders, it is clear this court cannot interfere; if it did it would be *making a new contract for the parties*, and subjecting them to stipulations which they never entered into, and never intended to enter into." [1]

[1] Manby *v.* Gresham Life Ass. Soc., 29 Beav. 439, 445.

§ 917. Another Statement of the Principle: Corporation not Permitted to Exercise Trust Corruptly.—The principle may be stated in another form, which will bring it into line with another class of cases, namely, those cases in which courts of chancery exercise their power over *corporations* which are charged with the administration of *charitable and other trusts.* Here, the principle is that the court will not interfere with the *discretion* of the corporation in respect of the management of the trust, except in so far as to prevent them from acting *corruptly* in its execution. This was well stated by Lord Eldon, in a case where a *school-master* had brought a bill in equity against a corporation, to which had been committed the management of a school and the nomination and rejection of a school-master. Lord Eldon said: "This is the case of a corporation, not called upon to give any account of corporation property or revenue, as such, but happening, in their corporate capacity, to be *trustees* for a *charitable purpose,* entrusted in that corporate capacity with the management of certain property, clothed with a trust for the maintenance of a school-master, and for this purpose I represent the case thus: that the corporation have the power of nominating the master, and of dismissing him, at their will and pleasure. A corporation, as an individual, with such a power over an estate, devoted to charitable purposes, would in this court be compelled to exercise that power, not according to the discretion of this court, but not corruptly. A trustee of either description, a corporation, or an individual, cannot be permitted to act corruptly in the execution of the trust." [1]

§ 918. Courts do not Sit as Courts of Appeal from Decisions of Committee or Club in Such Cases. — Whether the most limited view embraced in the first of the three foregoing paragraphs, or the most extensive, embraced in the second of the same, or the middle view embraced in the third, be adopted, it is equally apparent that courts do not, in such cases, sit as courts of appeal to revise the action of the majority of the club or of the governing body, in expelling the complaining member. They will not substitute their discretion for the discretion exercised by the club or its governing body. They will not reverse the decision of the club or of its governing body, although they may believe

[1] Dummer *v.* Corporation of Chippenham, 14 Ves. 245, 252.

it to be unjust, in the sense that they, under the same circumstances, would not have come to the same conclusion. They will treat it much as the Court of King's Bench has been in the habit of treating the decisions of inferior magistrates in summary proceedings, though exercising, it is confessed, a somewhat larger jurisdiction. They will inquire first, whether the expulsion was within the *jurisdiction* of the club or of the governing body, — that is, whether it was *intra vires* — whether it was authorized by any *rule* of the club which was binding upon all the members. Passing this jurisdictional inquiry, they will, it seems, inquire into the *reasonableness* of the rule in much the same manner as a court will inquire into the reasonableness of an appeal by a corporation; but they will not hold it to be unreasonable, unless it is contrary to the laws of the land, or plainly violative of natural justice. Beyond this, there remains but one further inquiry, namely, whether under the circumstances of the particular case, the majority of the governing body which voted for the expulsion acted reasonably and in good faith, or whether they acted unreasonably and capriciously, corruptly, oppressively or maliciously. And when the word reasonable is here used, it is not used in the sense that permits the court to substitute its reason for the reason of the members of the club, but it is used in a sense so restrictive that the court will not relieve the expelled member unless the occurrences on which his expulsion took place were such that no man could pronounce them reasonable. "We are not," said Cotton, L. J., "here to sit as a court of appeal from the decision of the committee of the general meeting. We are not here to say whether we should have arrived at such a conclusion or not; and the question whether the decision was erroneous or not can only be taken into consideration in determining whether that decision is so absurd or evidently wrong as to afford evidence that the action was not *bona fide*, but was malicious or capricious, or proceeding from something other than a fair and honest exercise of the powers given by the rule." [1]

§ **919. Not Sufficient that the Decision was Contrary to Reason.** — "The court," said Brett, L. J., in the same case, "has no right, in my opinion, to consider whether what was done was right or not, or, even as a substantive question, whether what was decided was reasonable or not. The only question is, whether it was done *bona fide*. Now, it is true that an element, in considering whether a matter has been done in good faith, is the question whether what has been done is really beyond all reason. If that were so, it would be evidence of want of good faith; but even where that exists, it is not a necessary conclusion

[1] Dawkins *v.* Antrobus, 17 Ch. Div. 615, 634.

that there has been want of good faith, for, even after having come to the conclusion that a decision was wholly unreasonable, one might be convinced *aliunde* that nevertheless there was no malice — that what was done was done in good faith. Therefore the mere proof that it was contrary to reason is no sufficient ground for the interference of the court. It is like the case of a malicious prosecution, where, if there is a want of reasonable and probable cause, that is evidence to go to the jury to support the other necessary allegation that there was malice in fact; but then the jury are told, 'even though there was a want of reasonable and probable cause, you must consider and decide for yourselves whether, besides that, there was malice in fact.' Unless they find there was also malice in fact in such cases, the propositions necessary for them to affirm are not made out. So, in this case, I wish to repeat, even though one were of opinion that the decision was wholly beyond reason, yet in such a case as this, considering the circumstances which are in evidence, and the persons against whom the charge is made, and the absolute absence of indirect motive — even if I thought the decisions were absolutely unreasonable — I should have declined to find the decision was contrary to good faith, and should therefore have been of opinion, even though the decision were unreasonable, that there was no ground for the interference of the court." [1] The observations of that very able judge, Jessel, M. R., whose decision was appealed from and affirmed in the same case, ought not to be overlooked. "I am not," said he, "able to say that I ought to impute to these gentlemen legal malice. I do not think it impossible that reasonable men could come to the conclusion, on some grounds not known to me, that the mere writing of that letter and the direction of it to Gen. Stephenson, was in itself an act which was injurious to the character and interests of the club. That being so, I am compelled by the exigencies of the case to act entirely on the opinion of the committee. I do not feel that it would be right to say that the committee were so unreasonable as to act entirely without reasonable and probable cause, or so corruptly biased and unfair as to knowingly state that to be their opinion which was not their opinion, fairly arrived at so far as their light and information enabled them to arrive at an opinion adverse to Colonel Dawkins." [2]

§ 920. Regularity of Suspension Presumed until the Contrary Appears. — Another rule which has been applied in these cases is that, where the power of suspension is vested in a certain tribunal or authority, as in the subordinate lodge, and is exercised by such tribunal or authority, the *regularity* of its exercise

[1] Dawkins *v.* Antrobus, 17 Ch. Div. 615, 630. [2] *Ibid.* 624.

will be *presumed* until the contrary appear, and the contrary must be made to appear by showing that the suspension was contrary to the constitution and laws of the order, which can only be shown by putting the constitution and laws of the order in evidence.[1]

§ **921. Effect of Acquiescence.** — On the one hand, the member must first exhaust his remedy within the corporation or society,[2] and on the other, he must not wait too long, before he applies to the courts. On principles of frequent application in courts of equity in dealing with corporations, he may lose by *laches* and *acquiescence*, his claim upon a court of equity for relief. Thus, it has been held that one who for nineteen years has acquiesced in his expulsion from the membership of a corporation for non-payment of corporate dues, will not be reinstated by the court.[3] But, on the other hand, it has been held, in an action brought against a suspended member by a corporate lodge of Odd Fellows, for arrears due by him, where it appeared that such member, on his admission to the lodge, had signed the constitution and by-laws, and thereby agreed to support the same, and to pay all legal demands against him, so long as he should continue a member of the lodge, — that by the fact of *suspension* the defendant did not cease to be a member; and that, while a member he continued liable by law, and by his express undertaking, to pay the contributions which the by-laws required.[4]

§ **922. Jurisdiction of Corporate Committee not Ousted by Fact of Judicial Investigation.** — The jurisdiction of the complaint committee or board of managers of the New York Produce Exchange over a complaint against a member, is not ousted by the fact that the case is also under judicial investigation; since cases may arise in which the committees would be justified in fining a member charged with "conduct inconsistent with just and equitable principles of trade, or other misconduct," when a

[1] Karcher *v.* Supreme Lodge, 137 Mass. 368.

[2] *Ante*, § 912.

[3] Bostwick *v.* Detroit Fire Department, 49 Mich. 513.

[4] Palmetto Lodge *v.* Hubbell, 2 Strobh. L. (S. C.) 457.

court of justice would not adjudge that he had incurred a *legal* liability.[1]

§ **923. Doctrine that Courts will not Interfere Except where Property Rights are Involved.**— Cases are found which go so far as to hold that, in the cases of religious, charitable and social organizations the judicial court will not interfere, in a case of expulsion of members, to reinstate them, and will not exercise jurisdiction to decide questions relating to the rights of membership, except where pecuniary interests are involved. Upon these questions the Supreme Court of Illinois has said: "Churches, Masonic bodies, Odd Fellows and temperance lodges are organized under a statutory charter; but we presume no one would imagine that a court could take cognizance of cases, so as in either of these organizations to compel them to restore to membership a person suspended or expelled from the privileges of the organization. They being organized by voluntary association, and not for the transaction of business, but for the purpose of inculcating their precepts and truths, not for pecuniary gain, but for the advancement of morals and for the improvement of their members, they are left to adopt their own constitutions, by-laws and regulations for admitting, suspending or expelling their members."[2] Where the expulsion has taken place, in conformity with the rules of the particular society, the expelled members are deemed to have assented to it, and to have subjected themselves to the application of the maxim *volenti non fit injuria.*[3]

§ **924. Courts will not Enforce Decisions of Judicatories of Unincorporated Societies.**— The courts of justice will not, it has been held, *enforce the decrees* of the self-constituted judicatories of such voluntary associations as the Freemasons and Odd Fellows, where no rights of property are involved.[4] The only exception to the rule that courts will not enforce decrees of tribunals selected by the purely voluntary act of the contending parties, is said to exist in the case of submis-

[1] Hurst *v.* New York Produce Exchange, 100 N. Y. 605, *mem.; s. c.* in full, 1 Cent. Rep. 260.

[2] People *v.* Board of Trade, 80 Ill. 134, opinion by Walker, J.

[3] State *v.* Grand Lodge, 8 Mo. App. 148, 153, opinion by Bakewell, J.

[4] Lloyd *v.* Loaring, 6 Ves. 773; Austin *v.* Searing, 16 N. Y. 112.

sions to arbitrators, which submissions and proceedings before the arbitrators, as well as their award, are matters which are carefully guarded by the law. Thus, upon a bill filed by three persons on behalf of themselves and all other members of a certain lodge of Freemasons except the defendant, for a discovery and injunction to compel the delivering up of the paraphernalia of the lodge,— Lord Eldon in passing upon a demurrer for want of parties, is reported to have said: "That this court will hold jurisdiction to have a chattel delivered up, I have no doubt; but I am alarmed at the notion, that these voluntary societies are to be permitted to state all their laws, forms, and constitutions, upon the record, and then to tell the court, they are individuals. Then what sort of a partnership is this; for it is now admitted to be a partnership? The bill states, that they subsist under a charter, granted by persons who are now dead; and therefore, if this charter cannot be produced, the society is gone. Upon principles of policy, the courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters. I desire my ground to be understood distinctly. I do not think, the court ought to permit persons, who can only sue as partners, to sue in a corporate character; and that is the effect of this bill." Further on he said: "I had great doubt, whether a voluntary association for the best purpose is to meet without the authority of a corporation, and make laws and statutes, which have no authority, and then call upon this court to administer all the moral justice that may arise upon the disputes among these, in a sense unauthorized bodies. It is singular that this court should sit upon the concerns of an association, which in law has no existence; and in that case, that this court should be ancillary to their agreement as to their toasts," etc.[1] In an unreported case of this kind,[2] Lord Thurlow is reported to have said that he would convince the parties that they had no laws or constitution.[3] In like manner, where the treasurer of a lodge of the Independent Order of Odd Fellows brought an action to recover personal property, which had been confis-

[1] Lloyd *v.* Loaring, 6 Ves. 773, 777, 778.

[2] Referred to by Lord Eldon in 6 Ves. 777.

[3] Cullen *v.* Duke of Queensberry, sometimes called the case of the Ladies Coterie, referred to by Lord Eldon, as stated in the text.

cated from another lodge of the same name by the grand lodge because of some alleged contumacious conduct of the latter lodge, the New York court held that the judicial tribunals did not sit to enforce the decrees of the judicatories of those voluntary associations, and therefore that the action did not lie. In so holding, Selden, J., said: "The effect of some of the provisions of these constitutions is to create a tribunal having power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer the property to others; the members of this tribunal being liable to constant fluctuations, and not subject in any case to the selection and control of the parties upon whose rights they sit in judgment. To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunal for themselves, in a specific case, by submission to arbitration, yet the power is guarded by the most cautious rules. A contract that the parties will submit, confers no power upon the arbitrators; and even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert bias or prejudice on the part of the arbitrator chosen. It would hardly accord with this scrupulous care to secure fairness, in such cases, that parties should be held legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuations."[1] In the same case, Brown, J., also said: "The by-laws and regulations of these voluntary associations may all be very well in their place and sphere, and may command generally the obedience and submission of those upon whom they are designed to act; they cannot, however, have the force of law, nor impair or affect the rights of property, against the will of its real owners. So long as the members of these bodies yield their assent or concurrence, it is all very well; the law interposes no obstacle or objection. But when orders and decrees, of the character of those referred to, are resisted, and the owners of property refuse to be deprived of it, then it will be found that property has rights, and the courts of justice have duties, of

[1] Austin *v.* Searing, 16 N. Y. 112, 123, *s. c.* 69 Am. Dec. 665.

which the plaintiff in this action seems to have an indifferent conception. The courts of justice cannot be called upon to aid in enforcing decrees of these self-created judicatories. The confiscation and forfeiture of property is an act of sovereign power; and the aid of this or any other court will not be rendered to enforce such proceedings, or to recognize legal or supposed legal rights founded upon them." [1]

§ 925. Suspension of a Lodge, When Void and When Voidable. — The principle upon which the validity of the suspension of a lodge of a benevolent order, by a superior judicatory, is to be tested, has been held the same as that which governs the validity of a judgment of the judicial courts. If the court has jurisdiction of the subject matter and of the parties, its judgment, however erroneous in law and upon the fact, concludes the parties, unless appealed from, and pronounces the law of the case. It is therefore binding, not only upon the court itself, but upon every other court, so far as it settles the rights in controversy between the particular parties. But if jurisdiction over the subject-matter and over the person is wanting, the judgment is a mere nullity. Being a nullity, there is no obligation to appeal from it. It is void in all courts and in all places. Applying these principles, it was held that the suspension of a subordinate lodge of an association called the Knights of Honor, by an official of the grand lodge called the supreme reporter, was not merely irregular, but was a nullity. Caldwell, J., said: "The constitution and by-laws then in force conferred no jurisdiction upon the supreme reporter to suspend subordinate lodges in any case, or for any offense; and his mandate suspending Harrisburgh lodge had no more effect, inside or outside the order, than if it had been made by one who did not belong to the order. Moreover, it was made without giving the lodge an opportunity to be heard, and for an alleged ground that had no existence in fact. If the supreme reporter had been vested with jurisdiction to try and suspend lodges, and he had given Harrisburgh lodge due notice of the proceedings, the fact that he erred in judgment, in the application of the law of the case, or in his finding of fact, would have been a mere irregularity, which might have been corrected on appeal, or in such a mode as the constitution provided; but until his judgment was reversed by the appropriate

[1] *Ibid.* 124. Selden, J., also placed his judgment upon another ground, namely, that it had not been shown that the defendants had ever assented to be bound by the provisions of the constitution of the grand lodge of Northern New York, as set forth in the complaint, by which lodge the confiscation of their property had been attempted.

supervisory power, it would be conclusive on the parties, and not subject to collateral attack in any tribunal. This is nothing more than the application to the decrees of these organizations affecting their members, of the familiar principles that obtain in relation to the validity and effect of judicial determinations of controversies between citizens in the courts. . . . None of the prerequisites here laid down as necessary to the validity and conclusiveness of the decrees of one of these tribunals exists in the case at bar. By the laws of the order in force at the time of this transaction, neither Harrisburgh lodge nor Hall (the deceased member) consented that the supreme reporter should have jurisdiction to try and suspend lodges, with or without notice. The action of the supreme reporter in suspending Harrisburgh lodge, was not taken according to the laws of the organization; it was not a question which that officer had authority to decide, and it was, moreover, taken without notice. It was not merely an erroneous proceeding on the part of that officer, but a usurpation which cannot affect the legal rights or change the legal *status* of any one." [1]

§ **926. Action for Damages for the Expulsion.** — Authority is found in an English case, for the proposition that no action for damages will lie against the committee of the society which decrees the unlawful expulsion. A genius for refinement has discovered a reason for this conclusion in the consideration that, the act of expulsion being *void*, the plaintiff has sustained no injury; since, notwithstanding the expulsion, he is still a member.[2] If this holding is to be accepted as the law, it results that the expelled member must either resort to the expensive remedies above pointed out, or else he must attempt to assert his rights in the society *by force*, and, if he is forcibly ejected, bring an action for the assault. The former course entails delay, expense and vexation; the latter entails danger and annoyance, and a rule ought not to be adopted which will drive the member to it, since it tends to breaches of the peace, and should hence be regarded as opposed to public policy. One case is found where the expelled member took the latter course, endeavored to enter the society's room, but was kept out by a policeman.

[1] Hall *v.* Supreme Lodge, 24 Fed. Rep. 450, 453, per Caldwell, J.

[2] Wood *v.* Woad, 9 Exch. 190. Some support for this conclusion is found in the old case of Ashley *v.* White, 2 Ld. Raym. 938, but that decision is placed upon several reasons, some of which go to show that the judges did not desire to do justice.

He, thereupon, brought an action against the defendants, who had stationed the policeman there for the purpose, and recovered a verdict of forty pounds, which Lord Denman refused to set aside.[1] American decisions may be found which sustain this view, and support actions for damages by the expelled member, without his previously resorting to force to assert his rights of membership.[2] So, it has been held that a member of a trades-union, unlawfully expelled therefrom, may maintain an action for the damages which he has thereby sustained, and, on the question of such damages, may prove a rule of the union that no member shall permit himself to be employed with an expelled member, and may also prove the fact that a "blacklist" containing the names of expelled members, was kept posted in the office of the union. It was further held that he might prove, as bearing on the amount of his damages, that, after his expulsion, he had been discharged from employment and informed that he was not wanted, but that the men belonging to the union were the ones to be employed. It was also held competent for him to prove what his earnings were, while a member of the union, and how much they had been diminished in consequence of his expulsion; and further that he might show his inability to obtain continuous employment after his expulsion, for the purpose of showing the extent of his damages.[3] But where the expulsion is within the powers of the corporation or society, which powers

[1] Inness *v.* Wylie, 1 Car. & K. 257. A humorous turn is given to this case by the manner in which Lord Denman directed the jury on the question whether the policeman had committed an assault upon the plaintiff, or was merely passive: "If the policeman was entirely passive, like a door or wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the doorway passive and not move at all."

[2] Ludowiski *v.* Benevolent Society, 29 Mo. App. 337, where it was held that the expelled member was entitled to recover at least nominal damages, and where a judgment of $5 was affirmed. In Washington Beneficial Society *v.* Bacher, 20 Pa. St. 425, it was held that a member of a mutual benefit society, expelled without the notice prescribed by the constitution and by-laws, might recover damages to the extent of the injury.

[3] Merscheim *v.* Musical Mutual Protective Union, 8 N. Y. Supp. 702. *s. c.* 29 N. Y. St. Rep. 235.

are exercised in good faith, under principles already explained, the expelled member must, of course, submit to whatever damages the expulsion entails under those rules, which are in the nature of a contract by which the members agree to abide. Thus, where a member of the New York Stock Exchange was expelled for *insolvency* caused by doing business recklessly, and his *seat was sold* by the Exchange, as provided by its constitution and by-laws, — it was held that he could not recover the proceeds of the sale from the exchange.[1]

§ 927. Action for Damages against Religious Corporations. — An action for damages will not lie against a *religious corporation* on the ground that the church represented by it has expelled the plaintiff from membership. The corporation has no control over and is not responsible for the action of the *church* body.[2] In delivering the opinion of the court upon this question, Cooley, J., said: "Connected with the corporation the statute contemplates that there will be a church, though possibly this may not be essential. In this case there is one. The church has its members, who are supposed to hold certain beliefs, and subscribe some covenant with each other, if such is the usage of the denomination to which the church is attached. The church is not incorporated, and has nothing whatever to do with the temporalities. It does not control the property or the trustees; it can receive nobody into the society and can expel nobody from it. On the other hand, the corporation has nothing to do with the church except as it provides for the church

[1] Belton *v.* Hatch, 109 N. Y. 593.

[2] Hardin *v.* Trustees, 51 Mich. 137; *s. c.* 12 Am. L. Reg. 288. The distinction between a church and a church corporation, is explained in the following cases: Baptist Church *v.* Witherell, 3 Paige (N. Y.), 296; *s. c.* 24 American Decisions, 223; Lawyer *v.* Chipperley, 7 Paige (N. Y.), 281; Robertson *v.* Bullions, 11 N. Y. 243; Bellport *v.* Tooker, 29 Barb. (N. Y.) 256; *s. c.* 21 N. Y. 267; Burrell *v.* Associate Reformed Church, 44 Barb. (N. Y.) 282; Miller *v.* Gable, 2 Den. (N. Y.) 492; Ferraria *v.* Vasconcellos, 31 Ill. 25; Calkins *v.* Cheney, 92 Ill. 463; Keyser *v.* Stansifer, 6 Ohio, 363; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; German &c. Cong. *v.* Pressler, 17 La. An. 127; O'Hara *v.* Stack, 90 Pa. St. 477; Sohier *v.* Trinity Church, 109 Mass. 1; Walrath *v.* Campbell, 28 Mich. 111. See also Hale *v.* Everett, 53 N. H. 9; Case of St. Mary's Church, 7 Serg. & R. (Pa.) 517.

wants. It cannot alter the church faith or covenant, it cannot receive members, it cannot expel members, it cannot prevent the church receiving or expelling whomsoever that body shall see fit to receive or expel. This concise statement is amply sufficient to show that this suit has no foundation. The corporation is sued for a tort which it neither committed nor had the power to prevent, and which has occurred in a proceeding where the interference of the corporation would have been an impertinence. But it is said that the church is an integral part of the corporation; or rather that it is the corporation in a spiritual capacity. Its being an integral part of the corporation proves nothing; counties, towns and school districts are integral parts of the State, but the State is not for that reason liable for their torts. And, as to spiritual capacity, the corporation has none; it is given capacity in respect to temporalities only. If the corporation had assumed to expel this plaintiff from the church, she might treat its action with contempt. But as she makes no complaint of wrongful corporate action, we must assume that the corporation has never invaded her rights. If the church has done so, the church alone is culprit." [1]

§ 928. **Criminal Information for Disfranchisement of Members.** — Cases are found in the English books where the King's Bench has granted criminal information against magistrates, who have exercised a discretionary authority with corrupt motives, as for instance in refusing license to publicans; [2] and it was said by Lord Mansfield, that where magistrates proceed from corrupt motives in order to serve *election* purposes, such an information might be granted.[3] At the same time it was held that the court would not grant such an information against the magistrates of a borough, for having disfranchised persons entitled to their freedom, although it was sworn that they had done it to serve election purposes, where the defendants denied that motive, and swore that they thought there was a legal ground for the disfranchisement, and where the ground on which the disfranchisement went had

[1] Hardin *v.* Trustees, 51 Mich. 137; *s. c.* 12 Am. L. Reg. 288; *s. c.* 47 Am. Rep. 556.

[2] Rex *v.* Hann, 3 Burr. 1716; Rex *v.* Williams, 3 Burr. 1317; Rex *v.* Baylis, 3 Burr. 1318; Rex *v.* Young, 1 Burr. 556.

[3] Rex *v.* Davie, Doug. 567, 568, where under the circumstances such an information was denied. Compare Rex. *v.* Athay, 2 Burr. 653.

not been decided. Lord Mansfield said: "There is great tenderness in granting informations in matters of election. How many instances do we recollect of mayors acting as returning officers after there has been judgment of ouster against the mayor under whom they derive their title, as at Wiggan, Marlow, Carmarthen, etc.? Yet no information has ever been granted in such a case. For the civil injury, when a corporator has been improperly removed, there is a specific remedy by a *mandamus*, and an action for a false return. Where a person, not entitled, intrudes, he may be removed by an information in the nature of *quo warranto*, and fined for his usurpation. If you would proceed criminally, prefer an indictment. That is more proper for a precedent. But how is the corruption proved? For the application, the *belief* of corrupt motives is sworn to, but the defendants positively deny the motives so imputed to them. The former restorations did not go upon the merits. The question whether non-residence is a cause for disfranchising a capital burgess (which was the ground of the amotions complained of), has never yet been tried. It is now clear that all the capital burgesses are of the council, yet, on the returns to the different *mandamuses*, *that* was disputed, and the contrary maintained on the part of the prosecutors; though they, being possessed of the charter, knew it to be so." Buller J., also said: "When corporators combine, and corruptly prostitute their offices to election purposes, I agree that such a case is a proper subject for an information. But the corruption should be made out. The defendants here positively deny the particulars of the charge, and the question concerning non-residence has never yet been decided. The defendants swear they believe it to be a solid ground of amotion; that they have used every means to bring it to a determination, but hitherto without success. As *that* point is yet undetermined, I should think it would be improper to suffer an information to go." [1]

§ 929. Articles of the Peace by one Partner Against Another. — Where one partner, by violence, forces his copartner out of the business premises of the firm, and threatens such partner with violence and danger to his life, if the latter should venture again to enter and use the premises, and it is necessary for such copartner to enter and use the premises for the purpose of carrying on his ordinary business as partner, the Court of Queen's Bench will permit the latter to exhibit articles of the peace against the former.[2]

[1] Rex *v.* Davie, Doug. 567.

[2] Reg *v.* Mallinson, 20 L. J. (M. C.) 33; *s. c.* 1 Eng. L. & Eq. 289.

§ 930. Action against Judge for Condemning without Notice. — It was held by Lord Ellenborough, at *nisi prius*, that an action on the case may be maintained against a judge of an ecclesiastical court, who excommunicates a party for refusing to obey an order which the court has not authority to make, or where the party has not previously been served with a citation or monition, nor had due notice of the order; and further, that the *practice* of the ecclesiastical court is *matter of fact* to be proved by evidence, and left to the jury.[1]

[1] Beaurein *v.* Scott, 3 Camp. 388.

CHAPTER XVIII.

BY-LAWS.

ARTICLE I. NATURE AND INTERPRETATION.

§ 935. **What is a By-Law.**—A by-law is a rule or law of a corporation for its government, or for the government of its members and officers, in the management of its affairs. It is a legislative act of the corporation, so to speak, and in enacting it, the solemnities and sanctions imposed by the charter must be observed.[1] It is said that the term "by-laws" has a peculiar and limited signification, and that it is used to designate "the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to

[1] Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508, 539.

regulate its own actions and concerns, and the rights and duties of its members among themselves." [1]

§ **936. Distinguished from a Resolution.**— It is distinguished from a *resolution*, which is directed to the attainment of a particular object in a given case. A resolution, it has been said, is not necessarily a by-law, though a by-law may be in the form of a resolution.[2] Where the governing statute prescribes that a corporation shall act in a given particular through a by-law, it cannot act through a mere resolution of its board of directors directed against a particular person,— as a resolution forfeiting the shares of a particular member for the non-payment of an assessment; [3] or directing the officers of a corporation to exclude a director of the corporation from the enjoyment of his rights.[4]

§ **937. Distinguished from a Regulation.**— Again, a corporate by-law is distinguished from those *rules* and *regulations* which a corporation may establish for the government of the public, or of those doing business with it, in the prosecution of their intercourse or business with it,— of which pertinent examples are afforded by the regulations of common carriers in respect of the conduct of passengers, designed, on the one hand, to maintain the rights of the carrier, and on the other hand, to promote the safety and comfort of the passenger.[5] A distinction has been taken between a by-law and a regulation of a corporation, to the effect that the validity of the former is a *judicial question*, while the latter is regarded as a *matter in pais*.[6] Thus, the regulations of a railroad company which operate upon and affect the rights of its passengers, are not, it has been said, properly speaking, by-laws of the corporation; and accordingly

[1] Com. *v.* Turner, 1 Cush. (Mass.) 493, 496. See also Flint *v.* Pierce, 99 Mass. 68, 70.

[2] Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508.

[3] Budd *v.* Multnomah St. R. Co., 15 Ore. 413; *s. c.* 3 Am. St. Rep. 169, 173.

[4] People *v.* Throop, 12 Wend. (N. Y.) 183.

[5] Instances of such regulations are found in the following, among many other cases: Harris *v.* Stevens, 31 Vt. 79; Hadencamp *v.* Second Avenue R. Co., 1 Sweeny (N. Y.), 490; Baltimore &c. R. Co. *v.* Wilkinson, 30 Md. 224.

[6] Compton *v.* Van Volkenburgh &c. R. Co., 34 N. J. L. 134.

their validity depends upon the fact of their being *reasonable*, and their reasonableness depends upon particular circumstances or matters *in pais*, and is therefore a *question for a jury*.[1] The soundness of this distinction is doubted. It is believed that the only sound distinction is that the by-law is more usually established for the government of the internal affairs of the corporation, while the regulation is established for the government of those concerned with it in its business, or rather for the government of its business with the public. In either case the sound rule is believed to be that the reasonableness of the rule is a question for the court.[2]

§ 938. Municipal Ordinances. — The word "ordinance" is generally employed to denote those laws, adopted by public or municipal corporations, not only for the conduct of the internal affairs of the corporation, but also for the regulation of its citizens and strangers dwelling within its gates, in respect of certain matters of police. The word "by-law" was originally synonymous with what we now designate as an ordinance. The word "by" was the Scandinavian word for town, and a by-law was hence a town law.[3] The analogy between what is called a by-law and a town ordinance has been often pointed out.[4]

[1] State *v.* Overton, 24 N. J. L. 433, 440; *s. c.* 61 Am. Dec. 671. See also Morris &c. R. Co. *v.* Ayres, 29 N. J. L. 393.

[2] *Post*, § 1022.

[3] Scan. Byr, — a town or village; Anglo-Saxon *Bylage*, a private law. Some form of this word has been used to designate a town or city in many languages of Europe and Asia, and is found in the word Balkh, which is the present name of an Oriental city, and in the corrupted word Cambalu (Khan-balkh) the city of the khan, which was the Tartar name of Pekin during the reigns in China of the successors of Gengis Khan. — *Vámbéry.*

[4] Robinson *v.* Mayor, 1 Humph. (Tenn.) 156; *s. c.* 34 Am. Dec. 625; Blanchard *v.* Bissell, 11 Oh. St. 96. See the learned note on municipal ordinances, 34 Am. Dec. 627, *et sequitur;* Dillon Mun. Corp. (4th ed.), § 307, *et seq.* Two definitions are given in a recent work of great value: 1. A law affecting a single village or township; a rule governing the inhabitants of a locality. 2. A rule or a law of a corporation for its own government. And. Law Dict., verb. by-law. This writer also adds: "By-laws are the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns and the rights and duties of its members among themselves." *Ibid.* In an old work, a by-law is defined to be "a law made *obiter*, or by the by." Terms de la Ley, ed. 1721. But this definition seems to be a mere aberration.

§ 939. To what Extent a Law. — Although a by-law is, from its nature, applicable to the particular corporate body, yet it is still in a certain sense *a law*, and is to be applied in the government of such body whenever the circumstances arise for which it was intended to provide.[1] If made in conformity with the charter or governing statute, it is as binding upon the individual members of the corporation as any public law of the State, though of course its sanctions may be different; [2] and according to views of some, they may be equally binding upon third persons acquainted with the method of business of the corporation; [3] though this is doubtful.

§ 940. May Operate as a Contract among the Members. — As will be more fully shown hereafter, when treating of the regulations of mutual benefit societies, a corporate by-law may also be regarded as a *contract* among the members, by which to determine their rights *inter sese*, and where the society has features resembling those of a life insurance company, by which to determine the rights of the beneficiaries named in its benefit certificates. Speaking with reference to this office of a by-law, it has been said: "The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. So far as its provisions are in the nature of a contract, the parties thereto are the members of the association, as between themselves; or the corporation upon the one side, and its individual members upon the other." [4]

[1] Gosling *v.* Veley, 7 Ad. & El. (N. S.) 406, 451; *s. c.* 19 L. J. (Q. B.) 135. And see Hopkins *v.* Mayor, 4 Mees. & W. 620, 640.

[2] Cummings *v.* Webster, 43 Me. 192; Weatherly *v.* Medical &c. Society, 76 Ala. 567; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159, 179; Came *v.* Brigham, 39 Me. 35; German &c. Congregation *v.* Pressler, 17 La. An. 127; Harrington *v.* Workingmen's Benevolent Asso., 70 Ga. 340; Poultney *v.* Bachman, 31 Hun (N. Y.), 49; Security Loan Asso. *v.* Lake, 69 Ala. 456; Union Bank *v.* Guice, 2 La. An. 249; Anacosta Tribe *v.* Murbach, 13 Md. 91; Brick Presbyterian Church *v.* Mayor &c., 5 Cow. (N. Y.) 538; McDermott *v.* Board of Police, 5 Abb. Pr. (N. Y.) 422.

[3] Cummings *v.* Webster, 43 Me. 192, 197. How far binding on the directors: Samuel *v.* Holliday, McCahon (Kan.), 224; Woolw. (U. S.) 400.

[4] Flint *v.* Pierce, 99 Mass. 68; *s. c.* 96 Am. Dec. 691.

§ 941. Members Charged with Knowledge of By-laws.— All the members of the corporation or society are presumed in law to have notice of its by-laws. This is a *legal presumption, conclusive* in its nature; and accordingly, direct proof of such notice is not required.[1] A better statement of this rule is that, when a person becomes a member of a corporation or society, he assumes the duty of knowing the internal laws of that society, and agrees to be governed by those laws, whether he knows them or not. If, therefore, an obligation arises against him under those laws, he can no more escape that obligation on the plea of ignorance, than he can be heard to plead ignorance of the law of the land, in order to escape a civil or criminal liability.[2]

§ 942. To what Extent Binding on Third Persons.— There are cases to the effect that a corporate by-law is binding on *third persons* doing business with the corporation, who have knowledge of the by-law.[3] But it is suggested that this principle can operate no further than this: Where the third person who deals with the corporation knows of its course of business, and follows a prescribed regulation which it has enacted for the conduct of its business, it will be presumed, in the silence of his contract with the corporation, that it was made with reference to such known course of business, exactly as, in the silence of a contract, a known *custom* may be presumed to enter into it and to form a part of it. This principle is also operative in respect of those *public regulations* of corporations which assume public duties to be performed toward the members of the public distributively, such as incorporated *common carriers*. In these cases, as al-

[1] Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Susquehanna Ins. Co. *v.* Perrine, 7 Watts & S. (Pa.) 348; Palmyra *v.* Morton, 25 Mo. 593; McLellan *v.* Board of Pub. Schools, 15 Mo. App. 362; Cummings *v.* Webster, 43 Me. 192; Arapahoe Cattle &c. Co. *v.* Stevens, 13 Colo. 534.

[2] As enforcing and illustrating this principle, see Bauer *v.* Samson Lodge, 102 Ind. 262; *s. c.* 13 Am. & Eng. Corp. Cas. 618; Presbyterian &c. Fund *v.* Allen, 106 Ind. 593; Mitchell *v.* Lycoming Mutual Ins. Co., 51 Pa. St. 402; Simeral *v.* Dubuque &c. Ins. Co., 18 Iowa, 319; Cole *v.* Iowa State Mutual Ins. Co., 18 Iowa 425. For a view that the by-laws of a corporation are evidence against its officers, although they be not corporators, see Bank *v.* Wollaston, 3 Harr. (Del.) 90.

[3] Cummings *v.* Webster, 43 Me. 192, 197. *Contra*, State *v.* Overton, 24 N. J. L. 435, 440.

ready suggested,[1] the incorporated carrier may make and enforce as against the members of the public who deal with it, *reasonable regulations* and those regulations, when known to such third persons will be binding upon them. For example, a regulation of a railway company touching the carriage of passengers, when known to a passenger, will be binding upon him. This principle may also operate in respect of the by-laws, called *ordinances*, of municipal corporations, which, within the incorporated territory, have the effect of laws governing all persons upon whom they operate by their terms, provided they are valid and legal, in conformity with the principles hereafter stated. But with the exception of these cases, it must be constantly kept in mind that the primary conception of a by-law of a private corporation is that it is a mere rule for the determination of the rights of the members *inter sese*, and for the government of the officers of the corporation in conducting the corporate business; and that it can have no effect as a law upon other persons,[2] and can have no influence upon contracts between the corporation and other parties, except as above stated.[3] A third party can enforce them only when he shows some *privity*, — as where he has advanced money, or other value, upon the credit of a corporate by-law, or the like.[4] Accordingly, a by-law of a *bank*, that all *payments* made and received must be examined at the time, does not prevent a party dealing with the bank from showing afterwards that there was a *mistake* in his *account*, or deposits and receipts.[5] The fact that the by-laws of a corporation express an individual liability of members for company debts, and that each member subscribed the by-laws merely to become a member, are not enough to sustain an action by a creditor of the company against a member for the amount due. He must at least show that he gave credit, or parted with value, on the faith of the by-laws having been so drawn up and signed by the members.[6]

[1] *Ante*, § 937.

[2] Mechanics' &c. Bank *v.* Smith, 19 Johns. (N. Y.) 115, 124; Flint *v.* Pierce, 99 Mass. 68; *s. c.* 96 Am. Dec. 691.

[3] Samuels *v.* Central &c. Ex. Co., McCahon (Kan.), 214.

[4] Flint *v.* Pierce, *supra.*

[5] Mechanics &c. Bank *v.* Smith, 19 Johns. (N. Y.) 115, 124.

[6] Flint *v.* Pierce, 99 Mass. 68; *s. c.* 96 Am. Dec. 691.

§ **943. Formalities Required in Enacting.** — If the charter prescribes any formality to be observed in the adoption of by-laws, of course it must be observed.[1] But if the charter is silent as to the formalities to be observed, a by-law may be adopted by *acts* as well as by *words;* by the uniform course of proceedings of a corporation, as well as by an express vote manifested in *writing*.[2] It has been said, speaking with reference to the question whether a certain by-law had been enacted, "even if there was *no record*, or the record was deficient, we consider it settled by the authorities that the enactment of a by-law need not necessarily be in *writing*, but may be inferred from facts proved."[3]

§ **944. Not Noticed Judicially but must be Proved.** — Like the special charters of corporations, where they consist of private statutes, the by-laws and ordinances of such bodies are not noticed judicially, but must be proved as facts.[4]

§ **945. Waiver of.** — So far as a by-law operates as a regulation of the conduct of the business of a corporation as between itself and the public, it may be *waived by all the members* so that the company will be bound by the doing of an act, contrary to its rules, provided it has received the assent of all its members.[5] The by-laws of a *mutual insurance company* are in the nature of a *contract* adopted among the members.[6] This being their character, it would seem to follow, on principle, that the *officers* of such a company, in dealing with the members, *have no authority to waive* the provisions of the by-laws, unless express power to do so has been conferred upon them; because the by-laws are private statutes by which the members have agreed to be governed.[7] Contrary to the above, it has been held

[1] Dunston *v.* Imperial Gaslight Co., 3 Barn. & Ad. 125.

[2] *Ibid.*; Fairfield Turnpike Co. *v.* Thorp, 13 Conn. 175; Langsdale *v.* Bonton, 12 Ind. 467.

[3] Lockwood *v.* Mechanics Nat. Bank, 9 R. I. 308, 335; *s. c.* 11 Am. Rep. 253, 267; citing Ang. & A. Corp., §§ 238, 328; Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324, 413; Reuter *v.* Telegraph Co., 6 El. & Bl. 341.

[4] Haven *v.* New Hampshire Asylum, 13 N. H. 532; *s. c.* 38 Am. Dec. 512; Lucas *v.* San Francisco, 7 Cal. 463, 474.

[5] Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36.

[6] *Ante*, § 946.

[7] Mulrey *v.* Shawmut Mutual Fire

that, where the by-laws and *conditions* of a mutual insurance company provided that all general or local agents shall be appointed by the secretary, and furnished with a certificate of appointment under seal, setting forth their powers, and that no insurance, whether original or continued, shall be considered binding unless the premium shall have been actually paid to some duly authorized and commissioned agent, — such by-laws and *conditions* are solely for the benefit of the insurer, and may be waived; and are waived, when he authorized his agent to deliver a policy and receive the premium, though such agent has not been duly authorized and commissioned, as provided in the by-laws. Such a course of dealing, adopted between the insurer and his agent, though wholly inconsistent with the provisions of the policy, cannot be set up by the insurer to defeat a recovery thereon.[1] But it is conceived that the doctrine of waiver has been so much enlarged, and the rules respecting the powers of agents so much varied by the courts, when dealing with *contracts of insurance*, that this subject cannot be profitably pursued, for the purpose of illustrating the extent to which the officers of other corporations may waive the provisions of their by-laws when dealing with third persons.

§ **946. Not retroactive.** — By-laws cannot be made to operate retrospectively.[2] It has been said: "A by-law or regulation means a rule for *future action*. *Ex post facto* laws are no more lawful for corporations than for States; and all by-laws, contrary to the general principles of the common law, or the policy of the State, are void." A by-law, therefore, enacting that from and after a given day, all members who are in default in the payment of their dues shall cease absolutely to be members,

Ins. Co., 4 Allen (Mass.), 116; *s. c.* 81 Am. Dec. 689; Murphy *v.* People's Ins. Co., 7 Allen (Mass.), 239; Evans *v.* Tri-Mountain Ins. Co., 9 Allen (Mass.), 329; Hale *v.* Mechanics' Mutual Fire Ins. Co., 6 Gray (Mass.), 169; *s. c.* 66 Am. Dec. 411; Brewer *v.* Chelsea &c. Ins. Co., 14 Gray (Mass.), 203, 209; Priest *v* Citizens' &c. Ins. Co., 3 Allen (Mass.), 602, 604; Behler *v.* German &c. Ins. Co., 68 Ind. 347, 354; Westchester Fire Ins. Co. *v.* Earle, 33 Mich. 143, 150; Clark *v.* New England Mutual Fire Ins. Co., 6 Cush. (Mass) 342; *s. c.* 53 Am. Dec. 44; Union Mutual Ins. Co. *v.* Keyser, 32 N. H. 313; *s. c.* 64 Am. Dec. 44.

[1] Susquehanna Mut. Fire Ins. Co. *v.* Elkins, 124 Pa. St. 484; *s. c.* 10 Am. St. Rep. 608.

[2] Howard *v.* Savannah, T. U. P. Charlt. (Ga.) 173.

and without any further action whatever on the part of the corporation or its board of trustees; that the failure to pay all dues remaining unpaid on a given day in each year thereafter, shall work the same forfeiture of membership; and that in each case the secretary shall drop the names of all such delinquent persons from the rolls of members, — has been held *void*, as an *ex post facto law*, in so far as it was an adjudication upon existing defaults. It was regarded as analogous to a foreclosure decree fixing a short term of payment. It enforced a new penalty beyond those existing at the time of default.[1]

§ 947. Where Enacted: No Extra-Territorial Force.— It has been held that a corporation cannot enact a by-law, or any rule or resolution for its government, except *within the State* under whose laws it is organized, and where it has a corporate existence.[2] But this can only mean that the corporation has no such power, considered as mere power. It does not mean that the by-laws of a corporation may not, in like manner as its charter, have force in a foreign State or country, if allowed to have force there by the comity of that State or country.

§ 948. Interpretation of By-laws. — In the interpretation of by-laws the same principles obtain which govern in the interpretation of statutes, contracts and other private instruments.[3] As in the case of statutes, so in the case of by-laws, the courts will, in construing them where two interpretations are possible, one of which will save them and make them valid and the other of which will render them invalid, so interpret them as to make them valid; since the purpose of violating the law of the land will not be imputed to their authors except where necessary.[4] The by-laws of a corporation, voluntary association, or other private society, when proved, are to be interpreted *by the court*, the same as a public law, and it is error to submit the interpretation of them to a jury. They should have a *reasonable construction*.[5]

[1] People *v.* Fire Department, 31 Mich. 458, 465.

[2] Mitchell *v.* Vermont Copper Mining Co., 40 N. Y. Superior Ct. 406; *ante*, § 694.

[3] State *v.* Conklin, 34 Wis. 1, 30; Re Dunkerson, 4 Biss. (U. S.) 227.

[4] Poulters' Co. *v.* Phillips, 6 Bing. New Cas. 314; Hibernia Fire Engine Co. *v.* Com., 93 Pa. St. 264.

[5] Osceola Tribe *v.* Rost, 15 Md.

A court will not construe them so strictly as to make them void, "if every particular reason for making them does not appear."[1] But where they establish a *penalty* for the non-performance of a duty, they will be *strictly construed*, the same as a penal statute; and if their validity is doubtful, they will be rather so construed as to make them void, than so as to make them valid for the purpose of upholding the penalty.[2]

§ 949. **Actions upon By-Laws.** — Actions are constantly brought upon by-laws by corporations against their members, and, in the case of municipal corporations, against other persons, to enforce penalties therein given. On the other hand, actions may be brought upon a by-law by a member against the corporation, on the theory, applicable to some by-laws, that it is a *contract* between the corporation and its members.[3] Although a *custom* of a particular corporation, especially of a municipal corporation, may be of such universality within the corporation, that courts there sitting will notice it judicially, yet they will not so notice a corporate by-law.[4] It must, therefore, be *pleaded*.

295; Higgins *v.* McCrea, 116 U. S. 671; Boogher *v.* Maryland Life Ins. Co., 6 Mo. App. 592; 1 Thomp. Trials, §1057, *et seq.*

[1] Vintner's Co. *v.* Passey, 1 Burr. 235.

[2] Mayor of Oxford *v.* Wildgoose, 3 Lev. 294 (penalty for refusing to take the office of chamberlain of the corporation). As to the construction of by-laws giving penalties for refusing to take the office of sheriff under the charter of London, see Rex *v.* Larwood, Carth. 306; City of London *v.* Vanacker, Carth. 480.

[3] *Ante*, § 940. A member of a corporation whose by-laws are subject to amendment, cannot maintain an action against the corporation under one of the by-laws which has been repealed by an amendment during his membership and before the bringing of his action. Schrick *v.* St. Louis Mut. House Building Co., 34 Mo. 423.

[4] There was a distinction in former times in regard to actions on *customs*, and actions upon *by-laws* of corporations. The court would take judicial notice of the *customs of London;* and therefore where an action was founded on a custom of London, it was not necessary to return the custom. But it seems that the court would not take judicial notice of the *by-laws of London;* and accordingly where an action was founded on such a by-law, it was necessary to return the by-law. This must be understood to refer to actions in the courts of the city of London, possibly in the Lord Mayor's court; and the expression returning the by-law, had reference to the return required to be made to a writ of *habeas corpus cum causa*, sued out in the King's Bench, to remove the cause thither. Watson *v.* Clerk, Comb. 138.

In counting upon it in a *declaration*, complaint or petition, the pleader proceeds in the same way which he would pursue in the case where any other private instrument was the foundation of the action. He may, of course, set out the instrument in his pleading, *in hæc verba*, or he may state it in substance and according to its legal effect, without reciting its exact language, and introduce the by-law itself as evidence under the pleading.[1]

§ 950. Action on By-Law Making Members Liable for Debts of Corporation. — An action will not lie by a creditor of a corporation against a member thereof, for a debt due the plaintiff by the corporation, upon a by-law making the members liable for the debts of the corporation, unless the defendant signed the by-law, or unless the plaintiff lent his money upon the faith of it.[2] A corporation cannot, by a mere by-law, in the absence of any statutory authority, bind its non-assenting stockholders for the payment of the debts of the corporation.[3] Nor can a bank make its stockholders liable for its bills by printing a notice thereon that they are so liable.[4]

[1] Kehlenbeck *v.* Logeman, 10 Daly (N. Y.), 447.

[2] Flint *v.* Pierce, 99 Mass. 68; *s. c.* 96 Am. Dec. 691. The court say: "The right of any third party, stranger to the association, to establish a legal claim through such a by-law, must depend upon the general principles applicable to express contracts, as laid down in Mellen *v.* Whipple, 1 Gray (Mass.), 317, and the subsequent decisions in Field *v.* Crawford, 6 *Id.* 116, and Dow *v.* Clark, 7 *Id.* 198. No action can be maintained by such third party, unless he can bring his case within some recognized exceptions to that general rule. A pledge like the one in question, if made for the purpose of enabling the corporation to obtain a loan upon the faith of it, and used for that purpose, may perhaps give a right of action against the subscribers in favor of a party who has been induced to advance money upon its credit. This seems to be implied strongly by the decision in the case of Trustees of Free Schools in Andover *v.* Flint, 13 Met. (Mass.) 539, 543; inasmuch as the plaintiff in that case appears to have failed to recover upon a similar claim, merely for the reason that the defendant had not signed the by-law. But no such facts are shown to exist in the present case. The plaintiff not only is no party to the contract contained in the by-law, but he fails to show any privity between himself and the defendant in relation to the subject matter, or to the consideration, of his demand."

[3] Reid *v.* Eatonton Man. Co., 40 Ga. 98; *s. c.* 2 Am. Rep. 563; Trustees *v.* Flint, 13 Met. (Mass.) 539; Flint *v.* Pierce, 99 Mass. 69; *s. c.* 96 Am. Dec. 691.

[4] Lowry *v.* Inman, 46 N. Y. 119.

ARTICLE II.

POWER TO ENACT AND MODE OF ENACTING.

SUBDIVISION I. At Common Law.

§ **955. Inherent Power to Make.**— By the principles of the common law, every corporation aggregate possesses the inherent power to make all necessary rules and regulations for its government and operation, although such power may not be expressly conferred in its charter, in the statute of its creation, or in any other statute.[1] It is regarded as a power that is included in the grant of the capacity of being a corporation. It is generally said to be "an incident to a corporation."[2] But if the charter or governing statute contains an express grant of power to enact by-laws, and the grant is by its terms *limited to specified cases* or specified purposes, the grant will operate as a *restriction* upon the power of legislation possessed by the corporation in this respect, and will exclude all other objects by implication, on the principle *expressio unius exclusio alterius.*[3]

[1] Drake *v.* Hudson River R. Co., 7 Barb. (N. Y.) 508; Martin *v.* Nashville Building Asso., 2 Cold. (Tenn.) 418; People *v.* Medical Society, 24 Barb. (N. Y.) 574.

[2] Rex *v.* Westwood, 2 Dow. & Cl. 21, 37 (House of Lords). "The power of making rules and regulations is necessarily incident to a corporation; and it is generally inserted in the act of incorporation, to define its nature and limit its extent." Mechanics &c. Bank *v.* Smith, 19 Johns. (N. Y.) 115, 124, per Woodworth, J. "The making of by-laws is incident to every corporation aggregate; for that power is included in the incorporation." London City *v.* Vanacker, Carth. 480, per Lord Holt, C. J. Cases are found where the proposition is put forward that corporations must *show* their power to pass by-laws (Dunham *v.* Trustees of Rochester, 5 Cow. (N. Y.) 462), and bring themselves by *proof* within that power. Taylor *v.* Griswold, 14 N. J. L. 222.

[3] Ang. & A. Corp., § 325; Child *v.* Hudson's Bay Co., 2 P. Williams, 207; State *v.* Ferguson, 33 N. H. 424, 430; State *v.* Mayor &c., 33 N. J. L. 57.

§ **956. Must be Made by the Corporators, not by the Directors.** — Laws governing the internal operations and business of a corporation are necessarily matters of such a constituent character that, in the absence of a statute otherwise providing,[1] they can only be made by the corporation at large, that is to say, by the members in their constituent character at a general meeting of the corporation. Without such statutory authorization, they can only be made by the *most numerous body* or constituency, and cannot be made by the directors, trustees or other managers.[2]

§ **957. Charters Conferring this Power on the Directors.** — Many charters and statutes no doubt exist, conferring this power upon the directors. In one case which has come under observation, the charter gave the board of directors express authority to adopt a by-law prohibiting the transfer of stock where the owner was in default.[3] In another case, it was held

[1] As hereafter seen such statutes exist in many States: 1 Rev. Stat. Mo. 1890, § 2506; *post*, § 978, *et seq.*

[2] Rex *v.* Westwood, 2 Dow. & Cl. 21, 36; Morton Gravel Road Co. *v.* Wysong, 51 Ind. 4; Carroll *v.* Mullanphy Savings Bank, 8 Mo. App. 249; State Savings Asso. *v.* Nixon-Jones Printing Co., 25 Mo. App. 642; Union Bank *v.* Ridgely 1 Harr. & G. (Md.) 324; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Martin *v.* Nashville Building Asso., 2 Cold. (Tenn.) 418; Bank of Holly Springs *v.* Pinson, 58 Miss. 421; State *v.* Curtis, 9 Nev. 325. In Indiana it has been said that the power to make by-laws resides in the members of the corporation at large, where there is no law or *valid usage* to the contrary. Morton Gravel Road *v.* Wysong, 51 Ind. 4, 12. What the court meant by "valid usage" in this passage is probably explained by the quotation which follows in the opinion from a work of reputation: "Unless by the charter or some general statute to which the charter is made subject, or by immemorial usage, this power is delegated to particular officers or members of the corporation, like every other incidental power, it resides in the members of the corporation at large, to be exercised by them in the same manner in which the charter may direct them to exercise other powers or transact their general business; and if the charter contain no such direction, to be exercised according to the rules of the common law," etc. Ang. & A. Corp., § 327; citing Union Bank *v.* Ridgely, 1 Harr. & G. (Md.) 324; Rex *v.* Westwood, 2 Dow. & Cl. 21. It is said in an English work: "In all corporations, to which the power of making by-laws is incident, it is to be exercised by the entire body of corporators, as distinguished from select bodies, unless the constitution of the corporation have vested the whole power of making by-laws in some particular part or body of the corporation." Grant Corp. 77; citing Rex *v.* Westwood, 2 Dow. & Cl. 21.

[3] Mechanics Bank *v.* Merchants' Bank, 45 Mo. 513.

that a provision of the charter, making the stock of the corporation personal property, and authorizing the board of directors to make rules and regulations concerning its transfer, subject to the general law of the State, authorized the board to adopt a rule prohibiting the transfer of such stock until all debts due by the owner thereof to the corporation should be paid, although such rule was inconsistent with the general law of the State governing the transfer of personal poperty.[1]

§ **958. What Quorum of a Select Body may Adopt.** — Where a statute authorizes a select body, *e.g.*, *directors* of a corporation, to make by-laws, a majority of that body, at least, is necessary to constitute a *quorum*.[2] Where the charter of a corporation authorizes the *president and directors* to adopt by-laws, it is held that by-laws may be adopted by a meeting at which the president and a *quorum* of the directors are present; and where the *quorum* consists of a majority the assent of a majority is sufficient in order to make the by-laws valid.[3]

§ **959. Delegation of Power to Select Body does not Necessarily Divest Power of General Body.**— A statutory delegation to a select body of the corporation, of the power to make by-laws, does not divest the inherent power of the general body, so to do, unless the statute so declares in express terms. Thus, although the power of making by-laws is vested in the *managers* of the corporation, and not in the stockholders, a by-law passed at a meeting called as a stockholder's meeting will be valid, if the stockholders and managers were the same persons, and all were present and participated.[4] This principle is also well illustrated by a leading English case, where a charter vested the right to elect burgesses in the general body of an ancient corporation, and gave a power to make by-laws to a select body. The general body made a by-law delegating the power to elect

[1] Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149. Compare Carroll *v.* Mullanphy Savings Bank, 8 Mo. App. 249, 253, where these two cases are distinguished.

[2] Ex parte Willcocks, 7 Cow. (N. Y.) 402; *ante*, § 726.

[3] Cahill *v.* Kalamazoo Mutual Ins. Co., 2 Doug. (Mich.) 124; *s. c.* 43 Am. Dec. 457, 461.

[4] People *v.* Sterling Manf. Co., 82 Ill. 457.

burgesses to the select body. It was held by the House of Lords, that this was a good by-law; for the power given by the charter to the select body to make by-laws did not divest the general body of the right to make such laws, which was incident to it at common law.[1]

§ **960. Amendment and Repeal of By-Laws.**— It is scarcely necessary to say that a corporation which is authorized by its charter to make such by-laws as may be necessary to attain the objects for which it is created, has power to change such by-laws from time to time, when necessary to carry out such objects.[2] But it is scarcely necessary to say that the power to amend or repeal by-laws, even when expressly conferred by the charter, cannot be so exercised as to impair any rights that have been given and vested by virtue of the by-law.[3]

SUBDIVISION II. Statutes Vesting Power in the Corporation or Members.

§ **962. General Statutory Power to make By-Laws not Inconsistent with Law, etc.** — Incorporated bureaus of immigration

[1] Rex *v.* Westwood, 2 Dow. & Cl. 21, 36.

[2] Schrick *v.* St. Louis Mut. House Building Co., 34 Mo. 423.

[3] Kent *v.* Quicksilver Mining Co., 78 N. Y. 159; when a stockholder will not be estopped from objecting: Bergman *v.* St. Paul Mut. Bldg. Asso., 29 Minn. 275.

"shall make by-laws in accordance with their objects: Provided, that such by-laws be not in contravention of the laws of this State or the laws and constitution of the United States."[1] - - - - Incorporated institutions of learning have power "to make such laws for their own government as may deemed proper: Provided, that the same shall not conflict with the constitution and laws of the United States or the constitution and laws of the State of Arkansas."[2] - - - - "All corporations have the right . . . to make by-laws, binding on their own members, not inconsistent with the laws of this State and of the United States."[3] - - - - Each *co-operative association* "may make its own by-laws, provided they be not repugnant to this act, nor to the laws of the State." A copy of such by-laws must be filed in the clerk's office of the place where it transacts business.[4] - - - - Corporations for the purpose of engaging in any species of trade, business, or commerce, "may make by-laws not inconsistent with the constitution of this State or constitution of the United States."[5] - - - - "Every corporation may adopt a code of regulations for its government, not inconsistent with the constitution and laws of the State."[6] - - - - *Horticultural* corporations "may adopt such by-laws for their protection and good order as it [they] may deem necessary, not inconsistent with the laws of this State."[7] Certain associations, such as labor, agricultural, religious, charitable, fire, hook and ladder companies, academies, jockey, yacht, sporting and other clubs may be incorporated and when so organized "every such corporation, and its officers and stockholders, may make by-laws not repugnant to the laws of the State."[8] - - - - Private business corporations "may establish by-laws for the government of their affairs and may alter or repeal the same."[9] - - - - "Savings banks and savings institutions may adopt by-laws for their government, not inconsistent with law."[10] - - - - Corporations for literary, scientific, religious and charitable purposes have power "to make rules, by-laws and ordinances, and do every thing needful for their good government and support not repugnant to the constitution and laws of the United States, to the constitution and laws of this State, or to the instrument upon which the corporations respectively are formed and established."[11] - - - - Corporations other than joint-stock companies "may make and adopt for their government, and to enable

[1] Ark. Dig. Stat. (1884), § 1016.

[2] Ark. Dig. Stat. (1884), § 1006.

[3] Ga. Code (1882), § 1679.

[4] Rev. Stat. Minn. (1881), p. 402, § 158.

[5] Gen. Stat. Nev. (1885), § 805.

[6] Rev. Stat. Ohio (1890), § 3249.

[7] Rev. Stat. Ind. (1888), § 3492.

[8] Gen. Stat. S. C. (1881), § 1372.

[9] Rev. Laws Vt. (1880), § 3281.

[10] Rev. Laws Vt. (1880), § 3562.

[11] Voor. Rev. Stat. La., p. 183, § 680.

them to conduct and pursue their business and purpose, all necessary by-laws and regulations not inconsistent with the constitution and laws of the United States and of this State."[1]

§ 963. For Management of Property and Regulation of Affairs. — Another class of statutes is a little more specific: granting the power either to corporations generally, or else to various named corporations, to make by-laws for the regulation of their affairs and the management of their property, or both, thus: In South Carolina, by general provision, "corporations shall have power . . . to make by-laws and regulations, consistent with the constitution and laws of this State, for their own government and the due and orderly conduct of their affairs, and the management of their property."[2] - - - - "All corporations may, whenever no other provision specially made . . . make by-laws and regulations, consistent with law, for their government and for the due and orderly conducting of their affairs and the management of their property."[3] - - - - "All corporations shall, when no other provision is specially made, be capable, . . . to make by-laws and regulations, consistent with the laws of the State, for their own government, and for the due and orderly conducting of their affairs, and the management of their property."[4] - - - - "Every corporation, where no other provision is specially made, may in its corporate name sue and be sued . . . and make by-laws and regulations consistent with law, for its own government, the due and orderly conducting of its affairs, and the management of its property."[5] - - - - "All corporations shall, when no other provision is specially made, be capable in their corporate name . . to make by-laws and regulations consistent with the laws of the State, for their own government, and for the due and orderly conducting of their affairs, and the management of their property."[6] - - - - Among the powers of corporations for pecuniary profit are the following: "To establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs in accordance with law."[7] - - - - "All corporations shall, when no other provision is specially made, be "capable . . . to make by-laws, consistent with the laws of the State, for their own government and the management of their property."[8] - - - - "Every corpo-

[1] Rev. Stat. W. Va. (1879), vol. 1, p. 327, § 8.

[2] Gen. Stat. S. C. (1881), § 1350.

[3] Pub. Stat. R. I. (1882), p. 368, § 1.

[4] Code N. C. (1883), vol. 1, § 663.

[5] Stat. Mass. 1882, p. 565, § 4.

[6] How. Mich. Stat. 1882, § 4860.

[7] Rev. Stat. Iowa, 1888, § 1609.

[8] Rev. Code Del. (1874), p. 376, § 1.

ration as such, has power: . . . 7. To make by-laws, not inconsistent with any existing law, for the management of its affairs." [1] - - - "The powers enumerated in the preceding section [§ 124], shall vest in every corporation in this State, whether the same be formed without, or by legislative enactment, although they may not be specified in its charter or articles of association." [2] - - - - Church, religious, benevolent, literary, agricultural or mechanical corporations have power "to make by-laws, not inconsistent with any existing law, for the government of its affairs and the management of its property." [3] - - - - "Every private corporation may, when no other provision is specially made . . . make by-laws consistent with law, for its government, the regulation of its affairs, and the management of its property." [4] - - - - "Among the powers of such bodies corporate," — corporations in general, — "shall be the following: . . . 7. To establish by-laws and make all rules and regulations deemed expedient for the management of their affairs not inconsistent with the constitution and laws of the United States and laws of this territory." [5] - - - - Manufacturing and other lawful business corporations have power "to ordain and establish by-laws for the government and regulation of their affairs, and to alter and repeal the same." [6] - - - A benevolent, charitable, scientific or missionary corporation shall have power "to make by-laws for the management of its affairs, not inconsistent with the constitution and laws of this State or of the United States." [7] - - - - A *Young Men's Christian Association*, upon being incorporated "shall have power to make by-laws for the management of the affairs of the association not inconsistent with the constitution and laws of this State." [8] - - - - A *driving-park, park, or agricultural corporation* can "make by-laws for the management of its affairs not inconsistent with the laws of this State or of the United States." [9] - - A corporation to prevent *cruelty to animals* "shall have power . . . 5. To make by-laws not inconsistent with the laws of this State or of the United States, for the management of its property and the regulation of its affairs." [10] - - - A corporation for *agricultural* or *horticultural purposes* can "make by-laws for the management of its affairs, not inconsistent with the laws

[1] Comp. Stat. Neb. (1887), p. 255, § 124.

[2] Comp. Stat. Neb. (1887), p. 256, § 125.

[3] Hill's Laws Ore. (1887), § 3299.

[4] Gen. Stat. Conn. (1888), § 1906.

[5] Rev. Stat. Ariz. (1887), § 233.

[6] Ark. Dig. Stat. (1884), § 972.

[7] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1922, § 2.

[8] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1934, § 2.

[9] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2007, § 2.

[10] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1933, § 2.

of this State or of the United States."[1] - - - - Business corporations, other than banking, insurance and railroad, have power "to establish by-laws, and make all rules and regulations deemed expedient for the management of their affairs not inconsistent with the constitution or laws of this State or of the United States."[2] - - - - Corporations for works of *public improvement*, have power "to make and establish such by-laws for the proper management and regulation of the affairs of the corporation as may be necessary and proper."[3] - - - - Corporations such as *railroads*, *canals* and the like can "establish by-laws, and make all rules and regulations deemed expedient for the management of its [their] affairs, in accordance with law, and not incompatible with an honest purpose."[4] - - - - *Manufacturing* corporations have power "to ordain and establish by-laws, for the government and regulation of their affairs, and to alter and repeal the same."[5] - - - - "The general powers of all corporations, chartered for purposes of individual profit, shall be — . . . 4. To establish by-laws and make all rules and regulations not inconsistent with the laws and the constitution, deemed expedient for the management of corporate affairs."[6] - - - - A corporation formed for the *recovery of stolen animals* and to insure against the loss of the same by being stolen "may adopt such by-laws for its regulation as are not inconsistent with the provisions of this act, and may therein prescribe the *compensation* of its *officers*."[7] - - - - *Charitable* corporations may "adopt such articles of association as may be necessary, declaring the objects and purposes thereof (which shall not be in conflict with the laws), the duties and liabilities of its members and officers, fixing the names of the officers of the association, the time and places of its meetings, the names of the persons elected to fill the several offices, the terms of its officers, and the time and manner of electing their successors, and such other matters as may be necessary to carry out its legitimate objects."[8] - - - - "Every corporation as such shall have power . . . to make ordinances, by-laws, and regulations for the government of its council, board, officers and agents, and the management and regulation of its property and business."[9] - - - - "Every corporation, in respect to which it is not otherwise

[1] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2015, § 2.

[2] Gen. Stat. Ky. (1888), p. 763, § 2.

[3] Voor. Rev. Stat La., p. 184, § 684.

[4] Rev. Stat. Minn. (1881), p. 369, § 4.

[5] Rev. Stat. Minn. (1881), p. 398, § 132.

[6] Tenn. Code (1884), § 1704.

[7] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2072, § 13.

[8] Florida Dig. Laws (1881), p. 242, § 2.

[9] Rev. Stat. W. Va. (1879), vol. 1, p. 304, § 1.

provided, may . . . make ordinances, by-laws and regulations, consistent with the laws of this State and of the United States, for the government of all under its authority, for the management of its estates, and the due and orderly conducting of its affairs."[1] - - - - "When the certificate of the auditor . . . the persons who shall have signed and acknowledged the same, and such persons as thereafter become their associates, or successors shall be a body politic and corporate and by their corporate name shall have succession . . . and power . . . Sixth. To make by-laws, not inconsistent with the law of this State, for the organization of the company, the management etc., and for carrying on all kinds of business within the objects and purposes of the company."[2]

§ 964. For the Regulation of its Property, Management of its Affairs, and Transfer of its Stock. — To the foregoing catalogue some statutes add, — "and for the transfer of its stock," — thus: "Every corporation, as such, has power: . . . 6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock."[3] - - - - "Every corporation, as such, shall have power: . . . Sixth, to make by-laws not inconsistent with the laws of the State, for the management of its property, the regulation of its affairs, and for the transfer of its stock."[4] - - - - "Every corporation, as such, has power . . . Sixth, to make by-laws not inconsistent with existing law, for the management of its property, the regulation of its affairs and for the transfer of its stock."[5] - - - - "Every private corporation, as such, has power — . . . 6. To make by-laws not inconsistent with existing laws for the management of its property, the regulation of its affairs and the transfer of its stock."[6] - - - - The persons who subscribe the articles of association and persons who become stockholders "shall be a corporation and as such may make by-laws, not inconsistent with law, for the management of the property of the corporation, the regulation of its affairs, and the transfer of its stock."[7]

§ 965. And as to Corporate Meetings.— Others add provisions as to corporate meetings and elections, and as to voting thereat, and especially as to voting by proxy,— thus: An educational and religious

1 Code Va. (1887), § 1068.

2 Rev. Stat. Iowa (1888), § 1792. This provision relates to savings banks.

3 2 Deer. Cal. Code, § 354.

4 Florida Dig. Laws (1881), p. 228, § 3.

5 Rev. Stat. Mo. (1889), § 2508.

6 Sayle's Tex. Civ. Stat., art. 575.

7 Rev. Laws Vt. (1880), § 3309.

corporation "may establish such rules and by-laws as may be necessary or proper for its government, and may determine how many members shall constitute a quorum for the transaction of business."[1] - - - - The corporation "may determine the manner of calling and conducting meetings; the number of members [shares] that shall entitle a member of a joint-stock company to a vote, and the mode of voting by proxy; it may make all necessary by-laws, not inconsistent with the laws of this State, and impose all necessary duties."[2] - - - - "The number, function, qualification and compensation of the officers of any" — building, loan or savings — "association, their terms of office, the times of their election, as well as the qualification of the electors, and the votes and manner of voting, and the periodical meetings of such corporation, shall be determined by the by-laws of such association, when not provided by this act."[3] - - - - All corporations may make by-laws consistent with the laws of the State and their charter,[4] and "may determine by their by-laws the manner of calling and conducting meetings; the number of members that constitute a quorum; the number of votes to be given by shareholders; the tenure of the several officers; the mode of voting by proxy; and of selling shares for neglect to pay assessments; and may enforce such by-laws by penalties not exceeding twenty dollars."[5] - - - - "Every company may determine, by its by-laws, the manner of calling and conducting all meetings, what number of shares shall entitle the stockholders to one or more votes, what number of stockholders shall attend, either in person or by proxy, or what number of shares or amount of interest shall be represented at any meeting, in order to constitute a quorum."[6]

§ 966. Corporate Meetings and Voting: Forfeiture of Shares: Penalties, etc. — "All corporations may by their by-laws, where no other provision is specially made, determine the manner of calling and conducting all meetings; the number of members that shall constitute a quorum; the number of shares that shall entitle a member to one or more votes; the mode of voting by proxy; the mode of selling shares for non-payment of assessments; and the tenure of office of the several officers; and the manner in which vacancies in any of the offices shall be filled till a regular election, and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty

1 Rev. Stat. Ind. (1888), § 3460.

2 Rev. Code Miss. (1880), § 1031.

3 Rev. Stat. Ind. (1888), § 3411.

4 Rev. Stat. Me. 1883, p. 399, § 2.

5 Rev. Stat. Me. (1883), p. 400, § 6.

6 Rev. Stat. N. J. (1877), p. 181, § 21.

dollars for any one offense: Provided, that no such by-law shall be made by any corporation repugnant to its charter." [1] - - - - "Corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting meetings, the number of shares that shall constitute a quorum, the number of shares that shall entitle the members to one or more votes, the mode of voting by proxy, the mode of selling shares for the non-payment of assessments and the tenure of office of the several officers, and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars for any one offense, but no such by-law shall be made by any corporation repugnant to the provision of its charter." [2] - - - - "Corporations shall, when no other provision is specially made, be capable . . . to make necessary by-laws; determine the manner of calling and conducting meetings, the number that shall constitute a quorum, the number of shares that shall entitle a member to one or more votes (Provided, each stockholder shall have one vote for each share owned and held by him for ten days previous to the meetings of the association): the mode of voting by proxy, the payment of assessments, and the mode of selling shares for the non-payment of assessments; and the tenure of office of the several officers." [3] - - - - "All corporations may, if no other provision is specially made, determine by their by-laws, how meetings shall be called and conducted; how many shall be a quorum; the number of shares that shall entitle the members to one or more votes; the mode of voting by proxy; when and how many shares shall be sold for non-payment of assessments, and may annex suitable penalties to such by-laws, not exceeding, in any case, twenty-five dollars, for any offence." [4] - - - - "Corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting their meetings, the number of members that shall constitute a quorum, the member of shares that shall entitle the members to one or more votes, the mode of voting by proxy, the mode of selling shares for the non-payment of assessments, and the tenure of office of the several officers. They may annex suitable penalties to such by-laws, not executing twenty dollars for one offense." [5] - - - - "Every corporation organized under any general or special law, unless other provision is specially made, may make, amend and repeal by-laws and

[1] Code N. C. (1883), vol. 1, § 664.

[2] Pub. Stat. R. I. (1882), p. 368, § 3.

[3] Rev. Stat. Ind. (1888), § 3002. The power to make by-laws is in the members at large of a corporation, when there is no law or usage to the contrary. Morton G. R. Co. *v.* Wysong, 51 Ind. 4.

[4] Rev. Code Del. (1874), p. 376, § 2.

[5] Rev. Stat. Minn. (1881), p. 450, § 409.

regulations, not inconsistent with law or its articles of organization for its own government, for the orderly conducting of its affairs, and the management of its property, for determining the manner of calling and conducting its meetings the manner of appointing and mode of voting by proxy, and the tenure of office of its several officers, and such others as shall be necessary or convenient for the accomplishment of its purposes, and may prescribe suitable penalties for the violation of its by-laws, not exceeding in any one case twenty dollars for any one offense."[1]

§ **967. Concerning Officers, Meetings, Elections, etc.**— "The by-laws of every corporation created under the provisions of this act"— an "act to provide for the organization and regulation of certain business corporations" — "shall be deemed and taken to be its law, and shall provide: 1. The number of directors of the corporation. 2. The term of office of such directors, which shall not exceed one year. 3. The manner of filling vacancies among directors and officers. 4. The time and place of the annual meeting. 5. The manner of calling and holding special meetings of the stockholders. 6. The number of stockholders who shall attend either in person or by proxy, at every meeting in order to constitute a quorum. 7. The officers of the corporation, the manner of their election by and among the directors, and their powers and duties. But such officers shall always include a president, a secretary and a treasurer. 8. The manner of electing or appointing inspectors of election. 9. The manner of amending the by-laws."[2] "A corporation may, by its by-laws, when no other provision is specially made, provide, among other things for: 1. The time place and manner of calling and conducting its meetings. 2. The number of stockholders or members constituting a quorum. 3. The mode of voting by proxy. 4. The time of the annual election for directors, and the mode and manner of giving notice thereof. 5. The compensation and duties of officers. 6. The manner of election and the tenure of office of all officers other than directors. 7. Suitable penalties for violation of by-laws not exceeding, in any case, one hundred dollars for any one offense."[3] "A corporation by its regulations, when no other provision is specially made in this title, may provide for: 1. The time, place and manner of

[1] Rev. Stat. Wis. (1878), § 1748.

[2] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1980, § 6. Substantially the same provision is found in a law of New York relating specially "to provide for the incorporation of companies to examine titles, and to guarantee the same, and bonds and mortgages. The 7th subsection adds after the word "treasurer," the words "and general manager."

[3] 2 Deer. Cal. Cork. (1885), § 303. The same provision is found literally in Rev. Stat. Idaho (1887), § 2980.

calling and conducting its meetings. 2. The number of stockholders or members constituting a quorum. 3. The time of the annual election for trustees or directors, and mode and manner of giving notice thereof. 4. The duties and compensations of officers. 5. The manner of election or appointment, and the tenure of office, of all officers other than the trustees or directors. 6. The qualification of members, when the corporation is not for profit." [1]

§ 968. Management of Property, Regulation of Affairs, Transfer of Stock, Duties of Officers.— "When so organized every such corporation" —certain business corporations — "shall possess the following powers: . . . . 5. To make by-laws for the management of its property, the regulation of its affairs, for the transfer of its stock, and defining the duties of its officers, and, from time to time, to amend the same." [2] - - - - "When organized every corporation" — to *examine titles* and to *guaranty* the same, and bonds and mortgages — "shall possess the following general powers: . . . 5. To make by-laws for the management of its property, the regulation of its affairs, for the transfer of its stock, and defining the duties of its oficers, and from time to time to amend the same." [3] - - - - Corporations for mining, manufacturing, or other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, colleges, seminaries, churches, libraries or any benevolent, charitable or scientific association, "shall have power to make by-laws not inconsistent with the laws of this territory, for the organization of the company, the management of its property, the regulation of its affairs, the transfer of its stock, and for carrying on all kinds of business within the objects and purposes of the company." [4] - - - - "The stockholders of such corporation,"—manufacturing, railroads, and other business corporations — "or the trustees, if the certificate of incorporation so provides, shall have power to make by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this territory, and prescribing the duties of officers, artificers and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company." [5]

§ 969. Same as Preceding: Also Number of Directors, Penalties, Liens upon Shares, etc. — "Every corporation, as such, shall

[1] Rev. Stat. Ohio (1890), § 3252.

[2] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1979, § 2.

[3] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1712, § 2.

[4] Comp. Laws N. M. (1884), § 195.

[5] Rev. Stat. Wy. (1887), § 509.

be deemed to have power . . . 6. To make by-laws not inconsistent with the constitution or laws of the United States or of this State, fixing and altering the number of its directors for the management of its property, the regulation and government of its affairs, and for the transfer of its stock, with penalties for the breach thereof not exceeding twenty dollars."[1] - - - - "Such corporation" — mining, quarrying or manufacturing — "has power . . . 5. To make all needful by-laws, rules and regulations for the transaction of its business, the management and control of its affairs, and the uses and disposition of its property, and for the transfer of its stock, and for the creation and preservation of a lien upon the shares of its stockholders for the payment of any debt or liability they may incur to the corporation."[2]

§ 970. Provisions Applicable to Benevolent, Religious, Educational, Literary, Social and Other Societies.— Any incorporated benevolent, religious, scientific, fraternal, beneficial, or educational association "shall make by-laws for its government and support and the management of its property, and therein provide, unless such provision is already made in its charter, for the admission of new members and how they shall be admitted, and prescribe their qualifications. Provision may also be made in such by-laws for the removal of officers for cause and for the expulsion of members guilty of any offense which affects the interests or good government of the corporation, or is indictable by the laws of the land: *Provided, always*, that such by-laws shall be conformable to the charter of such corporation, and shall not impair or limit any provision thereof or enlarge its scope, and shall not be contrary to the provisions of the constitution or laws of this State."[3] - - - - "Any association formed under the preceding section" — voluntary association without capital stock — "may make by-laws imposing fines and penalties, and lay assessments to further the objects of such association, but such by-laws shall be adopted by two-thirds of the members of the association."[4] - - - - A corporation for social, literary, æsthetic, political or recreative purposes has power "to make and adopt a constitution, by-laws, rules and regulations for the government of said corporation, and for the admission, voluntary withdrawal, censure, suspension and expulsion of its members, for the establishing and collection of fees and dues of its

[1] Rev. Stat. N. J. (1877), p. 175, § 1.

[2] Code of Ala. (1886), § 1562. By § 1664 of the same statute the same provision is extended to "all private corporations organized for carrying on lawful enterprises not otherwise specially provided for, when duly organized."

[3] Rev. Stat. Mo. (1889), § 2831.

[4] Gen. Stat. Conn. (1888), § 1908.

members, the number and election of its officers, and to define their duties and compensation, and for the safe-keeping of its property, and from time to time to alter, modify or change such constitution, rules and regulations; provided, however, that no constitution, by-laws, rules or regulations shall be made or adopted by said corporation which shall be inconsistent with the constitution and laws of the United States or of this State."[1] - - - - A *political club* may be incorporated with power "to make and adopt a constitution, by-laws, rules and regulations for the government of such corporation, and for the admission, voluntary withdrawal, censure, suspension and expulsion of its members, for the establishing and collection of the fees and dues of its members, the number and election of its officers, and to define their duties and compensation, and for the safe-keeping of its property, and the general conduct of its affairs, and from time to time to alter, modify or change such constitution, by-laws, rules and regulations; provided, however, that no constitution, by-laws, rules or regulations, shall be made or adopted by said corporation which shall be inconsistent with the constitution or laws of the United States or this State."[2] - - - - An *alumni association* may be incorporated with power "to adopt such a constitution and by-laws and rules and regulations as may be necessary or proper for its government and regulation, and for the accomplishment of the objects of its incorporation, not inconsistent with the laws of their State."[3] - - - - A *bar association* may be incorporated with power "to make by-laws, rules and regulations for the government of said association, and for admission, voluntary withdrawal, censure, suspension and expulsion of its members; for the establishing and collection of the fees and dues of its members, the number and election of its officers, and to define their duties and compensation, and for the safe-keeping of its property, and from time to time, to alter, modify or change such by-laws, rules and regulations, provided, however, that no by-laws, rules or regulations shall be made or adopted by said association which shall be inconsistent with the constitution or laws of the United States or of this State."[4] - - - - A *library society* may be incorporated with power to "prescribe by its by-laws what persons may thereafter become its members and have the right to vote at its meetings."[5] - - - - Any *debating society*, *literary*, *scientific*, *industrial* or *benevolent association* (other than col-

[1] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2022, § 2.

[2] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2028, § 2.

[3] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2030, § 4.

[4] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2032, § 2.

[5] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2041, § 3.

leges, universities, academies or seminaries) may be incorporated, and when incorporated may elect such officers and make such by-laws, rules, and regulations, as may be necessary and expedient for its own government, and the management of its fiscal and other affairs to effect their respective objects. A copy of such by-laws and all amendments thereto shall be filed in the office of the secretary of the territory, and no by-law shall be valid until so filed.[1] - - - - "Incorporated boards of trade may adopt and prescribe rules and by-laws for the government of its officers, directors, agents and members."[2] The law of Illinois governing *co-operative associations* for profit provides in section 6: "All by-laws of the association shall be adopted by the shareholders of the association," and in section 23: "No by-law shall be adopted, amended or repealed except by an affirmative vote of a majority of all the shareholders entitled to vote."[3]

§ 971. Provisions Applicable to Railroad Companies. — "Where no other provision is especially made by this act" — of railroad corporations — "a corporation formed under it, may by its by-laws, provide for: First. The time, place, and manner of calling and conducting the meeting of its directors and stockholders. Second. The number of stockholders constituting a quorum at meetings of stockholders. Third. The mode of voting by proxy at meetings of stockholders. Fourth. The time for holding annual elections for directors and the mode and manner of giving notice thereof. Fifth. The compensation and duties of officers. Sixth — The manner of election and the tenure of office of all officers other than directors. Seventh — Suitable fines for violations of by-laws, not exceeding in any case one hundred dollars for one offense; and Eighth — The mode and manner of collecting assessments, except as otherwise provided in this act."[4] - - - - "Every corporation formed under this act" — railroad corporations — "must within three months after filing articles of incorporation, adopt a code of by-laws for its government, not inconsistent with the laws of this territory. By-laws may be adopted by the stockholders representing a majority of all the subscribed capital stock, at a meeting of the stockholders called for that purpose by order of the acting president, served upon them personally in writing, or by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, if there be one published therein, but if not, then in some paper published in some adjoining county. The time specified in said order

[1] Comp. Laws N. M. (1884), §§ 235, 240.

[2] Rev. Stat. Ind. (1888), § 3523.

[3] Acts of Ill. 1887, p. 135.

[4] Comp. Laws, New Mex. (1884), § 2631.

for such meeting shall not be less than two weeks from the date thereof: Provided, that the written assent of the holders of two-thirds of the subscribed capital stock shall be effectual to adopt a code of by-laws without a meeting of the stockholders for that purpose." [1] - - - - "The corporation" — railroad — "has power . . . 6. To provide for the transfer of its stock and to make such by-laws as may be deemed necessary for the creation and preservation of a lien upon the stock of the shareholders for all indebtedness or liability they may incur to or with the corporation." [2] - - - - Railroad corporations "shall establish by-laws, and make all rules and regulations deemed necessary for the management of its affairs in accordance with law." [3] - - - - "A copy of the by-laws of the corporation" — railroad — "when formed and adopted by the stockholders, duly certified, shall be recorded" in the office of county clerk of each county through or into which such railroad is proposed to be run and in the office of the Secretary of State, "and all amendments and additions thereto, duly certified, shall also be recorded as herein provided, within ninety days after the adoption thereof." [4] - - - - "The corporation" — [street railways] — "has power to make such by-laws and rules as are necessary for the regulation of the business, and the management of the property of the corporation; and for the transfer of its stock; and for the creation and preservation of the lien on the shares of stockholders, for any debt or liability incurred by them to the corporation." [5]

§ 972. Provisions Applicable to Boom and Navigation Companies. — Corporations for the erection of *booms* and *dams* in certain counties "may establish by-laws, and make all rules and regulations deemed necessary for the management of its affairs in accordance with law." [6] - - - - A copy of the by-laws when formed and adopted by the stockholders, shall, within thirty days, and all amendments and additions thereto within ninety days after their adoption, be recorded in the office of the county clerk of the county in which the boom may be constructed and in the office of the Secretary of State.[7] "The company" — *navigation* corporations — "may adopt such by-laws for the management of its business, not inconsistent with law, as it may see fit; but no company organized hereunder shall have banking

[1] Comp. Laws New Mex. (1884), § 2630.

[2] Code of Ala. (1886), § 1580.

[3] Rev. Stat. W. Va. (1879), vol. 2, p. 943, § 4.

[4] Rev. Stat. W. Va. (1879), vol. 2, p. 943 § 5.

[5] Code of Ala. (1886), § 1608.

[6] Rev. Stat. W. Va. (1879), vol. 1, p. 279, § 4.

[7] Rev. Stat. W. Va. (1879), vol. 1, p. 279, § 5.

privileges, or powers not necessary for managing a line of vessels carrying freight and passengers." [1]

§ **973. Various Other Provisions.** — "Such corporation" — *banking* corporations — "when organized has power . . . 5. To make such by-laws as may be necessary for the management of its property, the regulation of its affairs, the creation and a preservation of a lien on the shares of any stockholder for any indebtedness or liability he may incur to the corporation, and such regulations as are deemed proper for the transfer of its stock." [2] - - - - "Such corporation" — *insurance* — "has the power . . . 5. To make such by-laws for the management of the property, the regulation of the affairs, the transfer of the stock of the corporation and the creation and preservation of a lien on the shares of stockholders for any indebtedness contracted with, or liability incurred to it, as may be deemed necessary." [3] - - - - *Macadamized, graded* and *plank road companies* "may make and publish such by-laws as they may deem proper, not inconsistent with any law of this State, in order to regulate travel upon such road, and the rules to be observed by persons in meeting or passing with teams or vehicles, and all other matters which may be deemed for the welfare of such company." [4] - - - - "The by-laws of every corporation created under the provisions of this statute" — the general incorporation act — "or accepting the same shall be deemed and taken to be its law, subordinate to this statute, the charter of the same, the constitution and laws of this commonwealth, and the constitution of the United States. They shall be made by the stockholders or members of the corporation, at a general meeting called for that purpose, unless the charter prescribes another body or a different mode. They shall prescribe the time and place of meeting of the corporation, the powers and duties of its officials, and such other matters as shall be pertinent and necessary for the business to be transacted, and may contain penalties for the breach thereof, not exceeding twenty dollars." [5] - - - - Corporations have power "to make by-laws not inconsistent with law for the management of its property, the regulation of its affairs, and for the transfer of its stock, if any such stock there be; for the forfeiture of stock not paid for and for disposition of the proceeds thereof; for the calling of regular, special and general meetings of the directors, managers and trustees of such corporation, and fixing the place or places where the same shall be held, and to provide

[1] Code of Ala. (1886), § 1657.

[2] Code of Ala. (1886), § 1525.

[3] Code of Ala. (1886), § 1535.

[4] Rev. Stat. Mo. (1889), § 2710.

[5] Brightly's Pur. Dig. Penn. Stat. 1885, p. 341, § 22.

for all other matters, which may be regulated by by-laws, and may from time to time, repeal, amend, or re-enact the same; but every such by-law, and every repeal, amendment, or re-enactment thereof, unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereof, shall, from that time only, cease to have force. The stockholders or members of a corporation may, at any general meeting, make by-laws, which shall not be rescinded by the directors, managers or trustees." [1]

§ **974. As to Forfeiting Shares.** — A corporation formed under the general incorporation act of Oregon is by statute declared to have power "to make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution: *provided*, that no such sale shall be made without thirty days' notice of time and place of sale in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs." [2]

§ **975. How Enacted.** — In enactment of by-laws, the stockholder shall be allowed one vote for each share of stock owned by him, and that in person or by proxy. And such by-law cannot be enacted, altered, or amended, added to, repealed, or suspended, except at a regular annual meeting of the stockholders, and by a majority vote of two-thirds in value of all the stockof the corporation.[3] - - - - "At the first meeting" — of *joint-stock* corporations — "by-laws for the regulation of the affairs of the corporation may be adopted. At any subsequent meeting of the stockholders specially called for that purpose, by-laws may be adopted, or the by-laws previously adopted may be altered or repealed." [4] - - - - "Regulations may be adopted or changed by the assent thereto, in writing, of two-thirds of the stockholders, or, if there is no capital stock, of the members, or by a majority of the stockholders or members, at a meeting held for that purpose, notice of which has been given by the acting president personally to each member or stockholder, or by publication in some newspaper of general circulation in the county in which the corporation is located, or in the counties through which its improvement does or will pass." [5] - - - -

[1] Rev. Code Md. (1878), p. 320, § 50.

[2] Hills' Laws Ore. (1887), § 3221.

[3] Sayle's Tex. Civ. Stat. 1888, vol. 2, art. 4136.

[4] Gen. Stat. Conn. (1888), § 1946.

[5] Rev. Stat. Ohio (1890), § 3251. This is a general provision.

"Every corporation formed under this title" — concerning corporations, general provisions — "must, within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the laws of Congress or of this territory. The assent of stockholders representing a majority of all the subscribed capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and if such meeting be called, two weeks' notice of the same by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or, if none be pnblished therein, then in a paper published at the capital of the territory, must be given by order of the acting president. The written assent of the holders of two-thirds of the stock subscribed, or of two-thirds of the members, if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose." [1] - - - - "Every corporation formed under this title" — general provisions applicable to all corporations — "must, within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the laws and constitution of this State. The assent of stockholders representing a majority of all the subscribed capital stock, or of a majority of the members, if there be no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose." After providing how that meeting may be called, the statute provides: that "the written assent of the holders of two-thirds of the stock, or of two-thirds of the members if there be no stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose." [2] - - - - The *stockholders* of *banks* of circulation, discount and deposit, "shall adopt by-laws for the government thereof and of the board of directors." [3] - - - - "When the word 'by-law' is used in this chapter" — a chapter to provide for the incorporation of joint-stock companies — "it is to be understood as if immediately followed by the word 'adopted by the stockholders in general meeting assembled.'" [4]

§ **976. How Amended, Repealed, etc.** — "By-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting, or at any other meeting of the stockholders or members, called for that purpose by the directors, by vote representing two-thirds of the subscribed stock, or by two-thirds of the members. The written assent of the holders of two-thirds of the stock, or of two-thirds of the members, if there be no capital, shall be effec-

[1] Rev. Stat. Idaho (1887), § 2588.

[2] 2 Deer. Cal. Code (1885), § 301.

[3] Rev. Laws Vt. (1880), § 3495.

[4] Rev. Stat. W. Va. (1879), p. 312, § 2.

tual to repeal or amend any by-law, or to adopt additional by-laws. The power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote at any such meeting, or similar written assent, be delegated to the board of directors. The power, when delegated, may be revoked by a similar vote, at any regular meeting of the stockholders or members." [1] - - - - The by-laws may be repealed or amended, or new by-laws may be adopted, at the annual meeting of the stockholders or members called for that purpose by the directors, by a vote representing two-thirds of the subscribed stock, or two-thirds of the members when there is no capital stock, or the power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote at any such meeting, be *delegated to the board* of directors. This power, when so delegated, may be revoked by a similar vote at any regular meeting of the stockholders or members.[2] - - - - "By-laws" of *railroad companies* — "may be amended or repealed, or new by-laws may be adopted at an annual meeting, or any other meeting of the stockholders called by the directors for that purpose, by a vote representing two-thirds of the subscribed capital stock, or the power to amend or repeal or adopt new by-laws, may by a similar vote, at any such meeting, be *delegated to the board* of directors. Such powers, when delegated, may be removed by a similar vote at any regular meeting of the stockholders." [3]

SUBDIVISION III. Statutes Vesting Power in the Directors or Other Officers.

§ 978. Enacted by the Directors, etc. — Directors or trustees may adopt by-laws for the corporation, but such may be amended

[1] 2 Deer. Cal. Code (1885), § 304.

[2] Rev. Stat. Idaho (1887), § 2591.

[3] Comp. Laws N. M. (1884), § 2692.

or altered or changed by a vote of stockholders at an election ordered for that purpose by the directors, on written application of a majority of the stockholders or members.[1] - - - - "Any company formed under this act" — an act to provide for the organization of town and county co-operative fire and lightning insurance companies — "may make and enforce such by-laws for its regulation as two-thirds of all the directors of such company may adopt, and any amendment of such by-laws may be adopted by being presented to the president at least three months previous to any meeting of such directors; but said proposed amendments shall be voted for at a regular meeting only, and two-thirds of the votes of all the directors shall be required to adopt them. No by-laws shall be of any effect which are inconsistent with this act or the laws of the State."[2] - - - - "By-laws to direct the manner of taking the votes of stockholders on the question of increasing or diminishing the number of directors or trustees, of changing the corporate name, may be made by the directors of the corporation for the time being."[3] - - - - "The directors or managers may adopt by-laws for the government of the officers and affairs of the company; provided they are not inconsistent with the laws of this State."[4] - - - - "The stockholders of any corporation formed under this act" — a general act for the formation of corporations — "or the directors or trustees, if the certificate of incorporation so provide, shall have power to make such prudential by-laws as they deem proper for the management of the affairs of the company, not inconsistent with the laws of this State, for the purpose of carrying on all kinds of business within the objects and purposes of such company."[5] - - - - "The trustees or directors of a corporation may adopt a code of by-laws for their government, not inconsistent with the regulations of the corporation, or the constitution and laws of the State, and may change the same at pleasure."[6] - - - - "The directors or trustees" — of every private corporation — "may adopt by-laws for the government of the corporation; but such by-laws may be altered, changed or amended by a majority vote of the stockholders at any election or special meeting ordered for that purpose by the directors or trustees, on a written application of a majority of the stockholders or members."[7] - - - - Corporations, either *business*, *literary*, *scientific* or *charitable*, "may make all such by-laws, rules and regulations, not inconsistent with the laws in

[1] Gen. Stat. Kan., vol. 1, § 1176.

[2] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1701, § 17.

[3] Rev. Stat. Mo. (1889), § 2506.

[4] Starr & Curt. Ill. Stat., p. 612, § 6. This is the general provision governing corporations when no special provision is made.

[5] Gen. Stat. Col. (1883), § 245.

[6] Rev. Stat. Ohio (1890), § 3250.

[7] Sayle's Tex. Cir. Stat., art. 581.

force, or which may be in force in this territory, and not inconsistent with other corporate rights and vested privileges, as may be necessary to carry into effect the object of the association; and such by-laws, rules and regulations may be made in a general meeting of the stockholders, or by a board of officers elected by them." [1]

§ 979. **Academies, Colleges, Seminaries, Universities.**— The board of trustees of colleges, academies, high schools or other seminaries of learning, "may make and adopt all necessary by-laws, rules and regulations not inconsistent with the laws of the United States or of this State, for the governing of such college, etc., and to enable the said board to properly discharge its duties as such." [2] - - - - The trustees of any incorporated *college* or *university* "may enact such by-laws not inconsistent with the laws of this State or of the United States, for the government of the institution, and for conducting the affairs of the corporation, as they may deem necessary." [3] - - - - Trustees of *colleges* and *seminaries* have power "to make all ordinances and by-laws necessary and proper to carry into effect the foregoing powers." [4]

§ 980. **Banks of Discount.**— "Every such bank"— incorporated banks of discount and deposit— "shall have power to prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its general business conducted, and the privileges granted it by law exercised and enjoyed." [5] - - - - "The directors"— of incorporated banks of discount and deposit— "are authorized to adopt such by-laws, not in conflict with this act, as may be necessary." [6]

§ 981. **Breeding Associations.**— "The corporators, or trustees, or directors, as the case may be, of any company organized under this act"— an act for the incorporation of associations for *improving the breed of horses*— "shall have power to make such by-laws, not inconsistent with the laws of this State, as may be deemed necessary for the government of its officers and the conducting of its affairs, and the same to alter or amend at pleasure; they may also prescribe such rules and regulations for the sale and transfer of the stock of the company as they may deem just and expedient." [7]

[1] Comp. Laws Utah (1876), § 534.

[2] Rev. Stat. W. Va. (1879), vol. 1, p. 291, § 11.

[3] Comp. Stat. Neb. (1887), p. 233, § 17.

[4] Rev. Stat. Minn. (1881), p. 405, § 175.

[5] Code Va. (1887), § 1156.

[6] Comp. Stat. Mont. (1888), p. 750 § 518.

[7] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2068, § 6. Also, *Ibid.*, p. 2074, § 6.

§ **982. Bridge Companies.** — "The said company" — *bridge corporation* — "shall have power from time to time, at any regular meeting of the board of directors, to make, alter, and change such by-laws and rules for the government of said company."[1] - - - - "The directors first elected" — of *bridge corporations* — "shall immediately provide a code of by-laws for the government of the corporation and management of its prudential concerns, and present the same to the company for adoption; which by-laws if not repugnant to the laws of the State, when approved by a vote of a majority of the stock represented, shall become a law and be binding on all parties concerned until altered or amended by a similar vote, at any meeting of the stockholders."[2]

§ **983. Building and Construction Companies.** — "The trustees of such company" — corporations for erecting *buildings*, *docks*, and *wharves*, buying and selling *lands*, erecting and using *elevators*, and making and dealing in building material — "shall have power to make such prudential by-laws as they shall deem proper, for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this State, and prescribing the duties of officers, artificers and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company."[3]

§ **984. Canal Companies.** — "The officers so elected" — of *canal corporations* — "shall provide a code of by-laws for the government of the corporation, regulating the use and navigation of the canal, and the tariff of tolls and water rents on the same; which by-laws when approved by a majority of the stockholders shall become law, and binding, until altered or amended by a vote of an annual or called meeting of the stockholders."[4]

§ **985. Gaslight Companies.** — "The directors of such company" — *gaslight corporations* — "shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this State, and prescribing the duties of officers, artificers, and servants that may be employed; for the appointment of all officers and for carrying on the business aforesaid."[5]

[1] Comp. Stat. Neb. (1887), p. 237, § 34.

[2] Rev. Stat. Ind. (1888), §§ 3533 and 3550.

[3] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1992, § 7.

[4] Rev. Stat. Ind. (1888), § 3572.

[5] 3 Rev. Stat. N. Y. (Banks & Bros. 8th. ed.), p. 2077 § 7.

§ 986. Guano Companies. — "The trustees of such company" — corporations to procure and traffic in *guano* — "shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this State, and prescribing the duties of officers, artificers and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the object and purposes of such company." [1]

§ 987. Guaranty Companies. — "The corporators, or the trustees or directors, as the case may be, of any company organized under this act" — an act to provide for the organization of *credit guaranty companies* — "shall have power to make such by-laws, not inconsistent with the constitution or the laws of this State, as may be deemed necessary for the government of its officers and conduct of its affairs, and the same, when necessary, to alter and amend." [2]

§ 988. Homestead Companies. — "The directors of such corporation" — associations to provide members with *homesteads* — "shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this State, or of the articles of the association; and prescribing the duties of directors, officers and servants that may be employed; for the appointment of officers and agents; for the security of the funds of the corporation, and for carrying out the objects and purposes of such corporation." [3]

§ 989. Hotel Companies. — "The trustees of such company" — corporations for erecting and keeping *hotels* — "shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of this State, and prescribing the duties of officers, artificers and servants that may be employed, for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company." [4]

[1] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2085, § 7.

[2] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1721, § 9. The same language, precisely, is used as to the right of fire and inland navigation and transportation insurance companies to make by-laws. 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1643, § 11.

[3] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2012, § 18.

[4] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2002, § 7.

§ 990. Industrial Co-operative and Mutual Benefit Societies.— "The trustees of such company"—corporation for *industrial* or *productive* purposes —"shall have power to make such prudential by-laws as they shall deem proper for the management and disposition of the stock and business affairs of such company, not inconsistent with the laws of the United States and of this territory, and prescribing the duties of officers, artificers, and servants that may be employed; for the appointment of all officers, and for carrying on all kinds of business within the objects and purposes of such company."[1] - - - - "The corporators, or trustees or directors, as the case may be, of any corporation organized under this act"—*co-operative* and *working-men's* unions —"shall have power to make such by-laws, not inconsistent with the laws of this State, as may be deemed necessary for the government of its officers and conducting of its affairs, and the same to alter and amend at pleasure."[2] - - - - "A majority of the trustees"—of *co-operative* and *mutual benefit* associations —"duly convened according to the by-laws, shall constitute a quorum for the transaction of business. The trustees shall adopt by-laws and regulations not inconsistent with the articles of association or the provisions of this act."[3]

§ 991. Inland Navigation Companies.—"The directors"—of *inland navigation companies* —"shall have power to make such reasonable by-laws, not inconsistent with the laws of this State or of the United States, as they shall deem proper for the management and disposition of the property, affairs and concerns of such company; for prescribing the power and duties of the officers of such company; for the appointment of such officers, and for the transaction and carrying on all kinds of business within the objects and purposes of such corporations."[4] - - - - "The officers so elected"—of *steam-packet companies* — "shall provide a code of by-laws for the government of the corporation; which by-laws, when approved by a majority of the stockholders, shall become law and binding until altered or amended by a vote of a meeting of the stockholders."[5]

§ 992. Insurance Companies.—"The directors of any such company"—of *insurance companies* — "shall have power to appoint a secretary . . . ; they may ordain and establish such by-laws and regulations, not inconsistent with this chapter . . . as shall appear

[1] Comp. Stat. Mont. (1888), p. 727, § 454.

[2] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 2046, § 6.

[3] Acts Mich. 1887, p. 195, § 10.

[4] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1855, § 7.

[5] Rev. Stat. Ind. (1888), § 4137.

to them necessary for regulating and conducting the business of the company."[1] - - - - "The corporators, or the trustees or directors, as the case may be, of any company organized under the provisions of this act" — an act to provide for the organization of *marine insurance companies* — "shall have power to make such by-laws, not inconsistent with the constitution or laws of this State, as may be deemed necessary for the government of its officers and the conduct of its affairs."[2] - - - - "The corporators, trustees, directors, members or representatives, as the case may be, of any association, corporation or society organized under this act" — an act to provide for the organization of co-operative or assessment *life* and *causualty insurance companies* — "shall have power to make such by-laws, not inconsistent with the constitution or laws of this State, or of the United States, as may be deemed necessary for the government of its officers and conduct of its affairs, and the same, when necessary, to alter and amend."[3] - - - - "The corporators, or the trustees, or directors, as the case may be, of any company" — *life, health and casualty insurance companies* — "organized under this act shall have power to adopt a seal, and to make such by-laws, not inconsistent with this act or the constitution and laws of this State, as may be deemed necessary for the management of its affairs."[4] - - - - A *mutual fire insurance* corporation, "may make by-laws and regulations for the government of its board of directors and other officers and agents, and the management and regulation of its property and business. . . . All by-laws shall be adopted by the directors of the company in a general meeting assembled, and shall be void if not consistent with the laws of this State."[5]

§ 993. Library Companies. — "The trustees" — of any *library corporation* — "shall establish by-laws and rules for the regulation of such library."[6]

§ 994. Manufacturing Companies. — "The trustees of such company" — *manufacturing* company — "for the time being, shall have power to make and prescribe such by-laws, rules and regulations as they shall deem proper respecting the management and disposition of the stock, property and estate of such company, the duties of the officers, artificers and servants by them to be employed, the election of trustees, and all such matters as appertain to the concerns of the said

[1] Rev. Stat. Iowa, 1888, § 1692.

[2] 3 Rev. Stat. N. Y. (Banks & Brothers 8th ed.), p. 1631, § 12.

[3] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1704, § 4.

[4] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1667, § 10.

[5] Rev. Stat. W. Va. (1879), vol. 1, p. 328, §§ 1, 5.

[6] Rev. Stat. Ind. (1888), § 3786.

company, to appoint such and so many officers, clerks and servants for carrying on the business of the said company, and with such wages as to them shall seem reasonable: Provided, That such by-laws be not inconsistent with the constitution and laws of this State or of the United States."[1]

§ **995. Mining and Smelting Companies.**—A *mining* and *smelting* corporation "may prescribe by-laws for the management of its business and affairs by a board of directors, trustees, committee or other officers or agents, and provide for their election or appointments, and prescribe their duties, and may require bond from any officer for the faithful discharge of duties, and may by such by-laws prescribe in respect to all matters appertaining to the business and affairs of said corporation, not inconsistent with the provisions of this act, nor the constitution or laws of this State. Such by-laws may be made, altered or amended by the directors, trustees or committee clothed with the general management of the affairs of such corporation; but the stockholders, at any regular meeting, may repeal or alter any by-law, or adopt new ones, and such action shall remain binding until repealed or changed by the stockholders themselves at some regular meeting."[2]

§ **996. Navigation Improvement Companies.**— Corporations for the *improvement of* the *navigation* of navigable rivers — called slack water navigation companies, have by "the directors of such company power to make by-laws for the management of the stock, property and business affairs of the company, not inconsistent with the laws of this State, and to prescribe the duties of officers and all other persons that may be employed by them, and for the appointment of the officers for carrying on all business within the object and purpose of the company."[3] - - - - "The officers so elected" — of corporations for *building dams* across streams so as to afford slack-water navigation — "shall provide a code of by-laws for the government of the corporation, regulating the use and navigation of such part of said watercourse as lies within the limits of said corporation, and the tariff of tolls and water rent on the same; which by-laws, when approved by a majority of the stockholders, shall become law and binding until altered or amended by a vote of an annual or called meeting of the stockholders."[4]

[1] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1949, § 6.

[2] Rev. Stat. Minn. (1881), p. 400, § 148.

[3] Rev. Stat. Ind. (1888), § 4106.

[4] Rev. Stat. Ind. (1888), § 4123.

§ 997. Plank-Road and Turnpike Companies.— "The president and directors"—of *plank road* companies—"shall have power to make and prescribe such by-laws, rules and regulations . . . as they may deem proper, not inconsistent with the constitution and laws of the United States or of this State."[1] - - - - "The president and directors"—of *turnpike companies*—"shall have power and it shall be their duty. . . . 2nd. To make such by-laws, rules and regulations as in their judgment the affairs of the corporation shall require."[2]

§ 998. Railroad Companies.— "The directors of a *railroad corporation* shall have the power to make by-laws for the management and disposition of the stock, property and business affairs of such company not inconsistent with the laws of this State, and prescribing the duties of officers, artificers and servants that may be employed, and for the appointment of all the officers for carrying on all the business within the object and purposes of such company."[3] - - - - "The board of directors"—of *railroad companies*—"shall have power to make, and from time to time to amend the by-laws of the company, and may, by such by-laws provide that less than a majority of the board shall constitute a quorum, and may delegate any and all of the powers of the board of directors to an executive committee during the interval between the meetings of the board."[4] - - - - "The directors of any *railroad* corporation shall have power to make such by-laws as they may think proper, and alter the same from time to time, for the transfer of the stock, and the management of the property and business of the company, of every description whatsoever, within the objects and purposes of such company, and for the prescribing the duties of officers, artificers, and employés of said company, and for the appointment of all officers, and all else that by them may be deemed needful and proper, within the scope and power of said company; provided, that such by-laws shall be approved by a majority of the stockholders and shall not be inconsistent or in conflict with the laws of this State, or with the articles of association."[5] - - - - "The directors of such company"—*street railway companies*—"shall have power to make by-laws for the management and disposition of the stock, property and business affairs of the company not inconsistent with the laws of this State; to prescribe the duties of officers, artificers, and servants that may be employed, for the appointment of all officers for

[1] How. Mich. Stat. 1882, § 3605.

[2] 2 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1465, § 14.

[3] Rev. Stat. Ind. (1888), § 3897.

[4] 3 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1768, § 4.

[5] Gen. Stat. Nev. (1885), § 843.

carrying on all business within the objects and purposes of such company; and for regulating the running-time, fare, etc., of said road or roads."[1]

§ 999. Religious Corporations. — "The board of trustees" — of any *church* or *religious corporation* — "is empowered to make such by-laws and rules as are necessary to carry out the objects of the trust."[2]

§ 1000. Safe Deposit Companies. — "The trustees of such corporations" — *safe-keeping companies* — "shall have power to make such by-laws as they shall deem proper for the management and disposition of the stock, property and business affairs of such company, not inconsistent with the laws of this State and of the United States, and prescribing the duties of officers and servants that may be employed, the manner of appointment and election of all officers, and for carrying on all kinds of business within the objects and purposes of said corporation."[3]

§ 1001. Savings Banks. — "The board" — of incorporated *savings banks*, — "may make by-laws and regulations for managing the property of the institution, conducting its business and paying its expenses; subject always to the power of the members in general meeting to repeal or modify such by-laws and regulations, and make others."[4] - - - - "The board of trustees" — of *saving banks*, *trust deposits* and *security associations*, incorporated — "shall have power from time to time to make, constitute, ordain and establish such by-laws, rules and regulations, as they shall deem proper for the election of their officers, and the appointment of agents, servants, and employés; for prescribing their respective functions, and the mode and manner of discharging the same; for the regulation of time of meeting of the officers and trustees; and generally for transacting, managing, and discharging the affairs of the association: Provided such by-laws, rules, and regulations, are not repugnant to this act, to the laws of this territory, or the constitution and laws of the United States."[5] - - - - "The board of directors of any such corporation" — *savings banks* — "shall have power, from time to time, to make such by-laws, rules and regulations as they may think proper, for the election of officers . . .

[1] Rev. Stat. Ind. (1888), § 4151.

[2] Rev. Stat. Ind. (1888), § 3623.

[3] 2 Rev. Stat. N. Y. (Bank & Bros. 8th ed.), p. 1605, § 7.

[4] Code Va. (1887), § 1177.

[5] Comp. Stat. Mont. (1888), p. 763, § 557.

and generally for transacting, managing and directing the affairs of the corporation; provided such by-laws, rules and regulations are not repugnant to, nor inconsistent with the provisions of this act, the constitution and laws of this State or of the United States." [1]

§ **1002. Telegraph Companies.** — "The board of directors" — of *telegraph companies* — "shall provide a code of by-laws for the government of the corporation and the management of its business." [2]

§ **1003. Trust Companies.** — "The trustees" — of *trust companies* — "shall have power to make and use a common seal . . . and shall have power, from time to time, to make and establish such by-laws, rules and regulations, not inconsistent with the laws of this State or of the United States, as they shall deem expedient for the conduct and management of the business affairs and property of said company; for the issue and transfer of the stock of said company; for determining the time and manner of holding elections and meetings of the company and of the trustees, for the filling of vacancies in the board of trustees, and for the conduct, management and regulation of all other matters that may appertain to the concerns of said corporation." [3]

ARTICLE III. REQUISITES AND VALIDITY.

[1] 2 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1566, § 251.

[2] Rev. Stat. Ind. (1888), § 4167.

[3] 2 Rev. Stat. N. Y. (Banks & Bros. 8th ed.), p. 1599, § 18.

§ 1010. General Statements of the Requisites of Good By-Laws. — Collecting certain general statements of the requisites of good by-laws which are to be met with in the decisions, — it may be said that a by-law must be *certain;*[1] must be directed to *all* within the sphere of its operation,[2] and must operate *equally* upon all to whom it applies.[3] To these it may be added that it must not be contrary to the charter,[4] or articles of association of the corporation,[5] or to the constitution or common or statute law of the State,[6] nor retroactive,[7] nor violative of vested rights,[8] nor in restraint of trade,[9] nor unreasonable,[10] nor contrary to good morals or public policy.[11]

[1] Goddard *v.* Merchants' Exchange, 9 Mo. App. 290, 295.

[2] *Post*, § 1018.

[3] Goddard *v.* Merchants' Exchange, 9 Mo. App. 290, 295; Stewart *v.* Father Matthew Society, 41 Mich. 67; Cartan *v.* Father Matthew Society, 3 Daly (N. Y.), 20; People *v.* Medical Society, 24 Barb. (N. Y.) 570.

[4] *Post*, § 1011.

[5] *Post*, § 1015.

[6] *Post*, § 1013.

[7] *Post*, § 1019.

[8] *Post*, § 1019.

[9] *Post*, § 1028.

[10] *Post*, § 1021.

[11] "The power of a corporation to make by-laws for the government of its members does not authorize it to violate law, nor to require its mem-

§ 1011. Must not be Contrary to the Charter. — By-laws which are contrary to the charter or governing statute of the corporation are of course void.[1] Stated in general terms, no by-law is valid which either *enlarges* or *restricts* the rights and powers conferred by the charter or governing statute;[2] for, as already seen, a body of co-adventurers cannot make themselves a corporation, or take to themselves corporate franchises without the authorization of the State.[3] So, by a parity of reasoning, they cannot enlarge, by the mere passage of by-laws, the powers and franchises which the State has seen fit to confer upon them; nor can the majority of them curtail or diminish those powers and franchises to the injury of a dissenting minority.[4] A common illustration of this principle is found in the proposition, supported by decisions almost without number, that the power given to a municipal corporation, by its charter or governing statute, to establish ordinances in certain cases and for certain

bers to do so. The power is limited by the nature of the corporation and the laws of the country. It can make no rule which is contrary to law, good morals, or public policy." Sayre *v.* Louisville &c. Asso., 1 Duv. (Ky.) 143; *s. c.* 85 Am. Dec. 613; citing Ang. & A. Corp., § 335. "Every by-law by which the benefit of the corporation is advanced is a good by-law for that very reason; that being the true touchstone of all by-laws." London City *v.* Vanacker, Carth. 480, 482, per Lord Holt, C. J.

[1] Kent *v.* Quicksilver Mining Co., 78 N. Y. 157, 182; Bergman *v.* St. Paul &c. Building Asso., 29 Minn. 275; State *v.* Curtis, 9 Nev. 325; Presbyterian &c. Fund *v.* Allen, 106 Ind. 593; American Legion of Honor *v.* Perry, 140 Mass. 580; State *v.* Curtis, 9 Nev. 325; Kearney *v.* Andrews, 10 N. J. Eq. 70; Brewster *v.* Hartley, 37 Cal. 15, 24; *s. c.* 99 Am. Dec. 237; Andrews *v.* Union &c. Ins. Co., 37 Me. 256; Rex *v.* Weymouth, 7 Mod. 373; Rex *v.* Bermstead, 2 Barn. & Ad. 699; Rex *v.* Spencer, 3 Burr. 1827. "A by-law may subject persons to *penalties*, but cannot make an act void which is warranted by the original constitution." Dr. Harscot's Case, Comb. 202, 203, per Holt, C. J. "They ought," said Lord Mansfield, "(as being the creature of the charter), to be restrained from making any by-laws inconsistent with it, or counteracting the end, intention, and directions of it; though it may not be unreasonable to allow a greater latitude in making by-laws, for the good of the corporation, to the common council of a corporation by prescription, where the common council is by prescription, and such prescription authorizes them to make by-laws for the good of the corporation." Rex *v.* Cutbush, 4 Burr. 2204.

[2] Brewster *v.* Hartley, 37 Cal. 15; *s. c.* 99 Am. Dec. 237; Great Falls &c. Ins. Co. *v.* Harvey, 45 N. H. 292; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159; Railway Co. *v.* Allerton, 18 Wall. (U. S.) 233.

[3] *Ante*, § 35.

[4] Brewster *v.* Hartley, 37 Cal. 15, 24; *s. c.* 99 Am. Dec. 237.

purposes, is a delegation of legislative power for those cases and those purposes only, and all others are excluded by implication.[1] Where there are general provisions for the enactment of ordinances or by-laws, and in the same charter there are specific provisions for special subject-matters, the general provisions do not enlarge or restrict the special provisions; nor do the specific provisions, for special subject-matters, curtail the power under the general provisions, any further than necessarily results from the nature of the special provisions, unless a contrary intent is apparent.[2] But it seems that a by-law is not necessarily void because it still further *restricts a provision of the charter*, unless the provision of the charter is couched in such terms as to show that the power to restrict was intended to be excluded.[3]

§ **1012. Illustrations.**— Thus, where the charter gives to the stockholders the power to elect the directors, the corporation cannot, by a by-law, take away this power.[4] So, where the charter of an insurance company authorizes it to insure against fire only, a by-law referred to in a policy recognizing damages by *lightning* as one of the risks assumed, imposes no obligation upon a company to pay for losses other than by fire,[5]— a decision which puts the public dealing with corporations at the peril of knowing the powers conferred by every special charter. So, where the *salaries* of some of the officers of a corporation are fixed by the charter, the corporation have no authority to change such salaries by the by-laws, although the charter contains a clause authorizing them to fix salaries. This can apply only to salaries not fixed by the charter.[6]

[1] New Orleans *v.* Philippi, 9 La. An. 44; Dill. Mun. Corp. (4th ed.), § 316.

[2] Huesing *v.* City of Rock Island, 128 Ill. 465.

[3] The charter of a borough provided that the mayor was to be chosen by the capital burgesses, out of the capital burgesses who should number 24; but a *usage*, founded on a by-law, was to the effect that the common burgesses should put five of the capital burgesses in nomination, out of which five the capital burgesses should choose one to be mayor. This was held to be but a usage, its object being merely to avoid popular confusion. Barber *v.* Boulton, 1 Strange, 314. But it is obvious that in this case the by-law was not at all restrictive of the charter provision, which simply regulated the mode of selection.

[4] Brewster *v.* Hartley, 37 Cal. 15, 24; *s. c.* 99 Am. Dec. 237.

[5] Andrews *v.* Union &c. Ins. Co., 37 Me. 256.

[6] Carr *v.* City of St. Louis, 9 Mo. 191.

§ 1013. **Must not be Contrary to Law.**— Generally speaking, a by-law which is contrary to the law of the land, common or statutory, is void.[1] For stronger reasons, it is void if it is contrary to the constitution of the State, for an act of the legislature in such a case is void.[2] As the legislative power cannot be *delegated*, it has been reasoned that the legislature cannot confer on a moneyed corporation power to enact by-laws contravening, repealing or in any wise changing, the statutory or common law of the land.[3]

§ 1014. **Limitations of the Foregoing Rule.** — But this is to be understood rather of by-laws which violate the positive injunctions of the statute law of the State, which are intended to operate universally and of those cases where no power has been conferred upon the corporation to make a different rule for the particular corporation or particular case. And, in its relation to the common law, it is to be understood of by-laws which violate those *fundamental principles of right* which are embodied in the common law. Obviously, the mere fact that a by-law makes a *different rule* for the government of the particular class of persons upon whom it operates, from the general rule of the common law, is no objection to its validity; for otherwise by-laws would be of no value, because unnecessary. As they could not dis-

[1] Bullard *v.* Bank, 18 Wall. (U. S.) 589; People *v.* Benevolent Society, 3 Hun (N. Y.), 361; People *v.* Fire Department, 31 Mich. 458; People *v.* Crockett, 9 Cal. 112; Kennebec &c. R. Co. *v.* Kendall, 31 Me. 470; Hayden *v.* Noyes, 5 Conn. 391; People *v.* Medical Soc., 24 Barb. (N. Y.) 570; New Orleans *v.* Philippi, 9 La. An. 44. So a *municipal ordinance* which is *repugnant* either to the constitution of the United States, the constitution of the particular State, or its general law, whether statute or common, is *ipso facto* void. Burlington *v.* Kellar, 18 Iowa, 65; Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205; Indianapolis *v.* Gaslight Co., 66 Ind. 396; Wilkesbarre City Hospital *v.* Luzerne, 84 Pa. St. 59; Livingston *v.* Albany, 41 Ga. 22; Wood *v.* Brooklyn, 14 Barb. (N. Y.) 425; State *v.* Hardy, 7 Neb. 377; Cullinan *v.* New Orleans, 28 La. An. 102; Illinois Central R. Co. *v.* Bloomington, 76 Ill. 447; Shreveport *v.* Levy, 26 La. An. 671; *s. c.* 21 Am. Rep. 553; Judson *v.* Reardon, 16 Minn. 431, 435; New Orleans *v.* Savings Bank, 31 La. An. 637; Walker *v.* New Orleans, 31 La. An. 828; State *v.* Caldwell, 3 La. An. 435; Vance *v.* Little Rock, 30 Ark. 435; Mayor *v.* Hussey, 21 Ga. 80; Haywood *v.* Mayor, 12 Ga. 404.

[2] State *v.* City of Cincinnati, 23 Ohio St. 445.

[3] Seneca County Bank *v.* Lamb, 26 Barb. (N. Y.) 595.

place or supplement rules of the common law, they would in all cases be nugatory. The mere suggestion of the case of the ordinances of municipal corporations will give point to this. By the principles of the common law, every man may lawfully engage in trade without restriction or without paying a tax for the privilege. By municipal ordinances, license taxes are imposed upon merchants doing business within the limits of the particular municipality, to which citizens outside the municipality are not subject by the ordinary law of the State. Such ordinances are therefore in a sense contrary to the law of the State, and yet they are not for this reason invalid, although they are enforced by the sanction of fine and imprisonment. So, the by-laws of municipal corporations frequently define and punish offenses of a petty character, of which the general statute law of the State and the common law take no notice; but they are not for this reason to be regarded as void, because contrary to the general law. It is therefore a sound conclusion that if a by-law of a corporation is not unreasonable, or contrary to the general policy of the law, the mere fact that it introduces *a new rule* which is not the rule of the common law does not render it invalid.[1]

§ 1015. Must not be Contrary to the Articles of Incorporation. — As already pointed out[2], the articles of incorporation, where the corporation is organized under a general law, occupy, when conformable to the governing statute, the place of a charter for the corporation, and in some States the word "charter" is used with reference to such articles. They are the *constitution* of the company, as distinguished from its *by-laws*, which in their relation to the former are in the nature of subordinate regulations. It follows that a by-law, by which a corporation undertakes to deprive a dissenting stockholder of a right secured to him by the articles of association, is void. Thus, it has been held that a building association cannot retire and cancel shares of stock against the will of the holder thereof.[3]

§ 1016. Must not be Contrary to Common Right. — The proposition that a corporate by-law must not be contrary to the

[1] Goddard *v.* Merchant's Exchange, 9 Mo. App. 290; *s. c.* affirmed, 78 Mo. 609.

[2] *Ante,* § 216.

[3] Bergman *v.* St. Paul Mut. Building Assoc. 29 Minn. 275.

common law, is, as has been suggested,[1] to be understood as meaning that it must not contravene those principles of *common right* which are imbedded in the common law. When, therefore, a by-law is contrary to common right, it will be declared void by the judicial courts, unless express legislative authority can be found for its enactment. This is very nearly the legal equivalent of the proposition, discussed hereafter, that by-laws are void when *unreasonable;*[2] since anything is unreasonable in a legal sense when it is contrary to a common right.

§ 1017. Illustrations of Municipal Ordinances Contrary to Common Right. — The author is indebted to a learned note of Mr. Freeman in the American Decisions,[3] for a collection of cases in which municipal by-laws have been held void, on the ground of being contrary to common right. This has been held of a by-law prohibiting all persons, except the inhabitants of a town, from taking *fish* from a navigable river within the town limits;[4] conferring a right to obstruct the *highway*, or the approaches to a bridge, so as to interfere with public travel;[5] under a power to regulate *wharves*, defining the line of high water mark and declaring the erection of buildings below that line a nuisance;[6] authorizing the *sale* without notice to the owner, of property left on the levee beyond a certain time;[7] imposing a *tax on wagons* of outside residents engaged in hauling into and out of the city;[8] assum-

[1] *Ante*, § 1014.

[2] *Post*, § 1023.

[3] 38 Am. Dec. 636.

[4] Hayden *v.* Noyes, 5 Conn. 391; Willard *v.* Killingworth, 8 Conn. 247.

[5] Stack *v.* East St. Louis, 85 Ill. 377; Pettis *v.* Johnson, 56 Ind. 139.

[6] Evansville *v.* Martin, 41 Ind. 145.

[7] Lanfear *v.* Mayor, 4 La. 97; *s. c.* 23 Am. Dec. 477.

[8] St. Charles *v.* Nolle, 51 Mo. 122. In numerous other cases municipal by-laws have been set aside which impose restrictions upon the free vending within the city limits of the producers of *farm produce.* In this respect the American municipal regulations are entirely different from those which obtain on the continent of Europe. In France it is permitted to municipalities to establish a local tax called an *octroi*, which is levied upon articles of farm produce, wines and other things consumed within the city by its inhabitants, and brought in by producers from the outside. Travelers who have carried their luncheon with them in a basket have had amusing experiences in Italian cities, with the collectors of this local tax, over the question of paying duty on their dinner. The American principle does not, it has been held, extend so far as to render a municipal ordinance void which exacts a license of a person whose business is that of manufacturing and whose manufacturing establishment is outside the city, but whose goods are delivered inside in his own wagons. Memphis *v.* Battaile, 8 Heisk. (Tenn.) 524; Edonton *v.* Capehart, 71 N. C. 156.

ing to regulate or prohibit *burying grounds* outside the corporate limits,[1] though within the corporate limits this is a proper subject of municipal regulation.[2] The proposition of the preceding section is also well illustrated by judicial holdings to the effect that a municipal ordinance authorizing the arrest of persons without warrant is void because in contravention of those principles of common right secured by the general law of the land.[3]

§ **1018. Must Operate Equally.** — Another principle, which is perhaps a mere paraphrase of the principle that by-laws must be reasonable and of the principle that they must not be contrary to common right, is that they must *operate equally* upon all persons of the class which they are intended to govern. On this ground, a municipal ordinance which is flagrantly unequal and partial will be set aside as void. It has been so held of an ordinance exacting a license for selling goods, and fixing one rate of license to be paid for selling goods within the corporate limits or *in transitu* to the city, and another and much larger rate for selling goods not within the city or *in transitu* to it.[4] The same has been held of a municipal ordinance imposing a license fee, and discriminating between merchants and manufacturers residing outside the city limits, and other persons of the same class residing within the city limits. Not only was this void because it operated unequally and partially, but it was held to be beyond the authority of the city council.[5] Another court

[1] Begein *v.* Anderson, 28 Ind. 79.

[2] City Council *v.* Baptist Church, 4 Strobh. L. (S. C.) 306; Coates *v.* Mayor, 7 Cow. (N. Y.) 585; Com. *v.* Fahey, 5 Cush. (Mass.) 408; Bogert *v.* Indianapolis, 13 Ind. 134; New Orleans *v.* St. Louis Church, 11 La. An. 244; Brick Presbyterian Church *v.* Mayor, 5 Cow. (N. Y.) 538; Com. *v.* Goodrich, 13 Allen (Mass.), 546; Musgrove *v.* Catholic Church, 10 La. An. 431. But such restraints must be reasonable; and an ordinance forbidding burials within the corporate limits but not in a populous section has been held void. Austin *v.* Murray, 16 Pick. (Mass.) 121. So, an ordinance prohibiting the erection of a private hospital within the city limits is not invalid. Milne *v.* Davidson, 5 Mart. (N. S.) (La.) 409; *s. c.* 16 Am. Dec. 189. So, an ordinance has been upheld, forbidding the purchase of the carcasses of dead animals for the purpose of boiling, steaming and rendering them, and prohibiting them from being boiled, steamed and rendered within certain limits. State *v.* Fisher, 52 Mo. 174, 177.

[3] Petersfield *v.* Vickers, 3 Coldw. (Tenn.) 205; Judson *v.* Reardon, 16 Minn. 431; Pinkerton *v.* Verberg, 30 Cent. L. J. 352.

[4] Ex parte Frank, 52 Cal. 606.

[5] Nashville *v.* Althorp, 5 Coldw. (Tenn.) 554. Accordingly, it has been

has said: "All corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive, as matter of grace, anything which is a matter of right; neither, on the one hand, should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporators."[1] So, it has been held that, under the power of a corporation to make by-laws, a resolution directed against the stock of a certain shareholder is unlawful.[2]

§ 1019. Must not Disturb Vested Rights. — As statutes which impair the obligation of contracts and disturb vested rights are unconstitutional and hence void,[3] so, for stronger reasons, the by-laws of a corporation will be held void, where they operate to disturb the vested rights of the members.[4] And, although the power is reserved to a corporation, by its charter, to alter, amend, or repeal its by-laws, it cannot repeal a by-law so as to impair rights which have become vested thereunder.[5] A striking illustration of this is found in the principle that where neither the charter nor the governing statute imposes on the members a personal liability to pay the debts of the corporation, such a liability cannot be created by any by-law or vote of the corporation so as to be binding on dissenting members.[6] So, where a city has granted to a *street railway company* a franchise to operate a railway with a double track, it cannot, after the company has expended money under the grant, restrict it to a single track, by an amendment to the ordinance conferring the franchise.[7]

said that "by-laws must be certain, must be directed to all within the sphere of their operation, and must operate equally." Goddard *v.* Merchants Exchange, 9 Mo. App. 290, 295; opinion by Hayden, J., quoted with approval in Budd *v.* Multnomah St. R. Co., 15 Ore. 413; *s. c.* 3 Am. St. Rep. 169, 174.

[1] People *v.* Young Men &c. Society, 41 Mich. 67.

[2] Budd *v.* Multnomah Street Ry. Co., 15 Ore. 413.

[3] *Post*, Ch. 117, Art. I.

[4] People *v.* Fire Department, 31 Mich. 458; People *v.* Crockett, 9 Cal. 112; Gray *v.* Portland Bank, 3 Mass. 363.

[5] Kent *v.* Quicksilver Mining Co., 78 N. Y. 159, affirming *s. c.* 12 Hun (N. Y.), 53.

[6] Trustees *v.* Flint, 13 Metc. (Mass.) 539; Kennebec &c. R. Co. *v.* Kendall, 31 Me. 470; Reid *v.* Eatonton Manufacturing Co., 40 Ga. 98.

[7] Burlington *v.* Burlington Street Railway Co., 49 Iowa, 144.

§ 1020. Must not be Unreasonable, Oppressive or Extortionate. — It may be stated, as a general rule, that, in the absence of any statutory restraint, and considering the question solely as a question between the corporation and its members, a by-law of a corporation, in order to be valid, must not be unreasonable, oppressive or extortionate.[1]

§ 1021. Must be Reasonable. — Corporations have none of the elements of sovereignty; they cannot go beyond the powers granted to them; they must exercise those powers in a reasonable manner; and whether they have, in a given instance, exercised them reasonably or unreasonably, is a question which it is competent for the judicial courts to decide.[2] It is therefore a principle of the common law, running back so far that its origin cannot be found, that the by-laws of a corporation will be set aside by the judicial courts when deemed unreasonable.[3] The principle applies equally to private and public corporations. No doubt it had its origin when nearly all corporations were municipal in character, and in the earliest cases it was asserted and applied in respect of municipal by-laws, called in modern times ordinances.[4] In other words, the judge, enlightened by

[1] Hagerman *v.* Ohio &c. Asso., 25 Ohio St. 186; Forest City &c. Asso. *v.* Gallagher, 25 Oh. St. 208; Citizens' &c. Asso. *v.* Webster, 25 Barb. (N. Y.) 263; Shannon *v.* Howard Building Asso., 36 Md. 383; State *v.* Overton, 24 N. J. L. 435; *s. c.* 61 Am. Dec. 671; People *v.* Throop, 12 Wend. (N. Y.) 183, 186; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99.

[2] Com *v.* Worcester, 3 Pick. (Mass.) 461, 473; St. Louis *v.* Weber, 44 Mo. 547.

[3] Com. Dig., tit. Franch., F. 10; Bac. Abr., tit. By-law; 2 Kyd Corp. 95; Sutton's Hospital Case, 10 Coke Rep. 1, 31*a*; London *v.* Vanacker, 1 Ld. Raym. 498; Rex *v.* Spencer, 3 Burr. 1828; Norris *v.* Staps, Hob. 211; Feltmakers *v.* Davis, 1 Bos. & P. 98, 100; Palmetto Lodge *v.* Hubbell, 2 Strobh. L. (S. C.) 457; 49 Am Dec. 604; Rex *v.* Richardson, 1 Burr. 539; Com. *v.* St. Patrick's Society, 2 Binn. (Pa.) 441; 4 Am. Dec. 453; Com. *v.* Cain, 5 Serg. & R. (Pa.) 512; St. Luke's Church *v.* Mathews, 4 Desau. (S. C.) 578, 585; *s. c.* 6 Am. Dec. 619; Gray *v.* Medical Soc., 24 Barb. (N. Y.) 570, 574; citing 2 Kent Com. 296. "A by-law must be reasonable, and for the common benefit; it must not be in restraint of trade, nor ought it to impose a burden without an apparent benefit." Commissioners *v.* Gas Co., 12 Pa. St. 318; Budd *v.* Multnomah Street R. Co., 15 Ore. 413; *s. c.* 3 Am. St. Rep. 169, 174. See on this subject: Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Hudson *v.* Thorne, 7 Paige (N. Y.), 261; Stokes *v.* City of New York, 14 Wend. (N. Y.) 87.

[4] The following cases assert and illustrate the principle that *municipal*

his knowledge of the principles of the law of the land, will assume the office of determining what is reasonable, contrary to the opinion of the corporators or of a majority of them. But this principle has its limits. If, in a strictly private association, the members agree among themselves that a particular rule is reasonable, the same not being opposed to the law in the sense of being immoral or criminal, the courts will give effect to it as a *private contract*, and will not set it aside because they may deem it unreasonable.[1] Neither can a by-law be set aside as unreasonable by the judicial courts, when it is within the powers *expressly conferred* upon the corporation; for, where the legislature, by a valid and constitutional law, have declared that a certain thing is reasonable, the courts cannot say that it is unreasonable.[2] Moreover, before a court will declare a corporate by-law or ordinance unreasonable, its unreasonableness must clearly appear. The courts will not look closely into mere matters of judgment, where there may be a reasonable difference of opinion.[3] It has been judicially stated, in respect of municipal ordinances, that " an ordinance, general in its scope, may be adjudged reasonable as applicable to *one state of facts*, and unreasonable when applied to circumstances of

ordinances will be set aside by the judicial courts when deemed unreasonable: Cape Girardeau *v.* Riley, 72 Mo. 220; Tugman *v.* Chicago, 78 Ill. 405; Atkinson *v.* Goodrich Transportation Co., 60 Wis. 141; Kirkham *v.* Russell, 76 Va. 956; Omaley *v.* Freeport, 96 Pa. St. 24; Meyers *v.* Chicago &c. R. Co., 57 Iowa, 555; Gillham *v.* Wells, 64 Ga. 192; Ex parte Chin Yan, 60 Cal. 78; Clayson *v.* Milwaukee, 30 Wis. 316; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; Com. *v.* Steffee, 7 Bush (Ky.), 161; People *v.* Throop, 12 Wend. (N. Y.) 183; Mayor *v.* Beasley, 1 Humph. (Tenn.) 232; *s. c.* 34 Am. Dec. 646; State *v.* Freeman, 38 N. H. 26; Whyte *v.* Nashville, 2 Swan (Tenn.), 364; Pedrick *v.* Bailey, 12 Gray (Mass.), 161; Ex parte Frank, 52 Cal. 606; Kip *v.* Paterson, 26 N. J. L. 298; Dayton *v.* Quigley, 29 N. J. Eq. 77; Commissioners *v.* Gas Co., 12 Pa. St. 318; Fisher *v.* Harrisburg, 2 Grant Cas. (Pa.) 291; Com. *v.* Robertson, 5 Cush. (Mass.) 438; Waters *v.* Leech, 3 Ark. 110; Mayor *v.* Winfield, 8 Humph. (Tenn.) 707; Davis *v.* Anita, 73 Iowa, 325. See further as to the validity of by-laws of municipal corporations: Floyd *v.* Commissioners, 14 Ga. 354; *s. c.* 58 Am. Dec. 559; Tanner *v.* Trustees, 5 Hill (N. Y.), 121; *s. c.* 40 Am. Dec. 337; Mobile *v.* Yuille, 3 Ala. 137; *s. c.* 36 Am. Dec. 441; Robinson *v.* Mayor &c. of Franklin, 1 Humph. (Tenn.) 156; *s. c.* 34 Am. Dec. 625; and see note 34 Am. Dec. 627, *et seq.*

[1] Kehlenbeck *v.* Logeman, 10 Daly (N. Y.), 447.

[2] Haynes *v.* Cape May, 50 N. J. L. 55; District of Columbia *v.* Waggeman, 4 Mackey (D. C.), 328.

[3] St. Louis *v.* Weber, 44 Mo. 547.

a *different character*."[1] But whether this principle can be appealed to in determining the validity of the by-law of a private corporation, is a question on which we are not enlightened by judicial authority.

§ 1022. Reasonableness of Corporate By-Laws a Question of Law.— The validity of a corporate by-law, as depending upon its reasonableness or otherwise, is a pure question of law, and is not to be submitted to a jury. Such by-laws may be set aside when, *in the opinion of the court*, they are *unreasonable*.[2] The same rule applies to the *regulations of railway companies* or other *public carriers;* and, although such a regulation is not strictly a corporate by-law, yet whether it is reasonable and hence valid, or unreasonable and hence void, is a question of law, and not of fact.[3] But whether a certain regulation of a railway company is *sufficient* for the prevention of collisions, has been held a question for a jury.[4] It has been held that the question of the reasonableness of a rule established by a railway company is a question of law for the court, where the facts are undisputed;[5] but when the question depends upon the existence of particular facts and circumstances, it is said to be a question for the jury, under proper instructions from the court.[6] It will be observed that this rule involves nothing more than the substitution of the opinion of the judge for that of the governing body of the corporation, in determining whether a corporate by-law is to stand or fall. The rule applies to the by-laws, more

[1] Knapp, J., in Nicoulin *v.* Lowery, 49 N. J. L. 391. See also Pennsylvania R. Co. *v.* Jersey City, 47 N. J. L. 286.

[2] Morris &c. R. Co. *v.* Ayres, 29 N. J. L. 393; *s. c.* 80 Am. Dec. 215; State *v.* Overton, 24 N. J. L. 435; *s. c.* 61 Am. Dec. 671; Neier *v.* Missouri Pacific R. Co., 12 Mo. App. 26; Merz *v.* Missouri Pacific R. Co., 14 Mo. App. 459; St. Louis *v.* Weber, 44 Mo. 547; St. Louis *v.* St. Louis R. Co, 14 Mo. App. 221; Commonwealth *v.* Worcester, 3 Pick. (Mass.) 461, 473.

[3] State *v.* Overton, 24 N. J. L. 435; *s. c.* 61 Am. Dec. 671; Illinois Central R. Co. *v.* Whittemore, 43 Ill. 420, 423; Vedder *v.* Fellows, 20 N. Y. 126. At the same time, it has been held proper to admit *testimony* in regard to the *necessity* of such a rule. Illinois Central R. Co. *v.* Whittemore, *supra.*

[4] Chicago &c. R. Co. *v.* McLallen, 84 Ill. 109, 116.

[5] Old Colony R. Co. *v.* Tripp, 33 Am. & Eng. R. Cas. 488, 496; Vedder *v.* Fellows, 20 N. Y. 126, 131.

[6] Pittsburgh &c. R. Co. *v.* Lyon, 123 Pa. St. 140; *s. c.* 10 Am. St. Rep. 517.

usually called *ordinances*, of *municipal corporations*, which impose penalties for prescribed offenses; the question of their reasonableness is a question of law.[1]

§ 1023. Illustrations of By-laws Held Void because Unreasonable. — A by-law of the *merchants' exchange*, which compels members to submit their business controversies to *arbitration*, on pain of suspension or expulsion, is *unreasonable* and void.[2] - - - - It has been held that a by-law of an *incorporated association of carriers* by water, declaring that no member "shall go into any river or trade and work for less than the wages, nor take, bargain for, or carry any freight for less than the established rate in the trade," and imposing a fine for a violation of such by-law, and prohibiting the members from employing agents who do not belong to the association, or to some association acting in concert with it, and prohibiting them from advertising or working for any boat not represented in that or in some other association acting in concert with it, is unreasonable and void, because it imposes an obligation on the members not to carry freight for less than the rate fixed by the association, without reference to the question whether the rate was reasonable or not.[3] - - - - It was held that a by-law of the city of London compelling dancing masters to accept the freedom of the company of minstrels was a bad by-law. "The court held the by-law to be naught to oblige dancing masters to be of the company of musitioners." Lord Holt said: "The musitioners were no corporation, they are a brotherhood or club to meet and drink and talk together, that's all. The city might make a guild or fraternity of dancing masters (though they cannot make a corporation), and then it were reasonable to oblige the dancing masters to be of that company, but not of a foreign company. A dancing master might be of another company before, which tho' it were not this case, yet if any such case may happen, the by-law is not good. The by-law should be mended throughout; the city hath nothing to do to set rates and prices for dancing."[4] - - - - A by-law imposing a duty upon a member of a corporation and affixing a penalty to the non-performance of it unless there be *reasonable excuse* for not performing it, which reasonable excuse is to be approved by a court of the corporation, was held void because it had the effect of

[1] Kneedler *v.* Norristown, 100 Pa. St. 368; *s. c.* 45 Am. Rep. 383; Commissioner *v.* Northern Liberties Gas Co., 12 Pa. St. 318; Fisher *v.* Harrisburg, 2 Grant Cas. (Pa.) 291; Dayton *v.* Quigley, 29 N. J. Eq. 77; 1 Dill. Mun. Corp., §§ 319, 320, 321.

[2] State *v.* Merchants' Exchange, 2 Mo. App. 96.

[3] Sayre *v.* Louisville &c. Asso., 1 Duv. (Ky.) 143; *s. c.* 85 Am. Dec. 613.

[4] Robinson *v.* Groscot, Comb. 372, 373.

making the corporation a judge in its own case. "Here," said Lord Holt, C. J., "the cause of excuse is to be approved by them, so that if it were reasonable and not approved, the party would be without remedy." It was so held concerning a by-law of the community of stationers of London, which provided that the master wardens and assistants or a major part of them should from time to time elect such members as they should think fit, into the livery of the society, and that if any person so elected should refuse to accept the office without a reasonable excuse, to be approved of by the court of assistants, he should forfeit £40.[1]

§ 1024. Instances of Municipal By-laws held Unreasonable and hence Void. — As the holdings of the courts in passing upon the reasonableness of *municipal ordinances* may afford some analogy upon the corresponding question in its relation to the by-laws of private corporations, a number of instances in which municipal ordinances have been held invalid because unreasonable are here given. Some of them are taken from a note to the admirable treatise of Judge Dillon on Municipal Corporations,[2] and for others the writer is indebted to a learned note of Mr. Freeman, the editor of the American Decisions.[3] The following municipal ordinances have been held void because unreasonable: Requiring steamboats to have *spark arresters;*[4] requiring druggists to furnish *verified statements* of the sales of intoxicating liquors, to whom sold, etc.;[5] exacting a *license from peddlers* of "not less than one nor more than twenty-five dollars for a fixed time, in the discretion of the mayor."[6] Requiring *cotton merchants* to keep a *record* of the names of those who sell to them loose cotton, the quantity of each purchase, etc., — the same being against the principles of personal liberty and common right;[7] absolutely prohibiting *street processions* with music, banners, torches, singing, shouting, etc., under a severe fine and imprisonment, without express legislative authority;[8] a *public school* regulation denying admission to a candidate who could not pass a satisfactory examination in *grammar;*[9] *expelling* a child from *school* for refusing un-

[1] Stationers of London *v.* Salisbury, Comb. 221.

[2] 1 Dill. Mun. Corp., § 319, note.

[3] 34 Am. Dec. 633.

[4] Atkinson *v.* Goodrich Transportation Co., 60 Wis. 141.

[5] Clinton *v.* Phillips, 58 Ill. 102; *s. c.* 11 Am. Rep. 52.

[6] State Center *v.* Barenstein, 66 Iowa, 249.

[7] Long *v.* Taxing District, 7 Lea (Tenn.), 134.

[8] Re Frazee, 63 Mich. 396; *s. c.* 30 N. W. Rep. 72; 35 Alb. L. J. 6. Compare People *v.* Rochester, 44 Hun (N. Y.), 166 (Salvation Army parading with banners).

[9] Trustees *v.* People, 87 Ill. 303.

der the direction of her parents to study *book-keeping;*[1] requiring the police to arrest all *free negroes* found on the street after ten o'clock at night and to place them in confinement until morning;[2] levying a *tax for a sidewalk* in an uninhabited portion of the city, disconnected with any other street or sidewalk,[3] prohibiting licensed retailers of *intoxicants* from selling between six o'clock p. m. and 6 o'clock a. m.;[4] compelling the removal from within city limits of a *steam engine* which is not in itself a nuisance;[5] requiring a *railroad* company to keep a *flagman* by day and a red lantern by night at a particular street crossing, which was not necessarily dangerous;[6] prohibiting the sale without license at *temporary stands* in the public street, of lemonade, ice cream, cake, cheese, nuts, pies and fruits;[7] imposing a fee or tax of five cents on every *sale of hay* or *country produce;*[8] prohibiting a *gas company* from opening a paved street in order to connect a main pipe with the opposite side of the street;[9] requiring owners and exhibitors at *theaters* to pay the city constable a fee for attendance;[10] prohibiting producers from *vending vegetables* upon the streets without an annual license costing twenty-five dollars;[11] forbidding *sales* of goods by store keepers on *Sunday*, and exempting Hebrews from its provisions;[12] imposing a *license* fee on *hucksters;*[13] forbidding *porters*, *hackmen* and *hotel runners* from approaching within twenty feet of depot, unless so requested by a passenger, — the regulation being in contravention of arrangements made by the railroad company for the delivery of baggage;[14] refusing to *supply water* to premises on application of the owner, on the ground that the tenant was in arrears for water furnished him while occupying premises of another landlord;[15] prohibiting *auctioneers* from selling, except to the highest bidder;[16] prohibiting one person from carrying on *dangerous business*, and permitting another to do so;[17] prohibiting the use of *Babcock fire extinguishers* under any and all circumstances at fires, and providing that the chief

[1] Rulison *v.* Post, 79 Ill. 567.

[2] Mayor *v.* Winfield, 8 Humph. (Tenn.) 707.

[3] Corrigan *v.* Gage, 68 Mo. 541.

[4] Ward *v.* Greenville, 8 Baxt. (Tenn.) 228; *s. c.* 35 Am. Rep. 700.

[5] Baltimore *v.* Radecke, 49 Md. 217; *s. c.* 33 Am. Rep. 239.

[6] Toledo &c. R. Co. *v.* Jacksonville, 67 Ill. 38; *s. c.* 16 Am. Rep. 611.

[7] Barling *v.* West, 29 Wis. 307; *s. c.* 9 Am. Rep. 576.

[8] Kip *v.* Paterson, 26 N. L. L. 298.

[9] Commissioners *v.* Northern Liberties Gas Co., 12 Pa. St. 318.

[10] Waters *v.* Leech, 3 Ark. 110.

[11] St. Paul *v.* Traeger, 25 Minn. 248; *s. c.* 33 Am. Rep. 462.

[12] Shreveport *v.* Levy, 26 La. An. 671; *s. c.* 21 Am. Rep. 553.

[13] Dunham *v.* Trustees, 5 Cow. (N. Y.) 462.

[14] Napman *v.* People, 19 Mich. 352.

[15] Dayton *v.* Quigley, 29 N. J. Eq. 77.

[16] Ex parte Martin, 27 Ark. 467.

[17] Mayor *v.* Thorn, 7 Paige (N. Y.), 261.

engineer shall send to jail persons found working them;[1] prohibiting the *slaughtering of animals* on one's own premises unless the building is devoted to that purpose;[2] providing that the *city sexton*, whose fees are paid out of the estates of deceased persons, shall expend five hundred dollars on the public burying ground, and bury paupers free of charge;[3] compelling the owner of property to destroy or remove it, the same not shown to be a *nuisance;*[4] prescribing a penalty of not less than one nor more than five hundred dollars for every hour that a person shall keep his *wagon* within the limits of the *market.*[5]

§ 1025. Illustrations of Municipal By-laws Held not Unreasonable. — The subject may also be illustrated by a collection of cases in which municipal by-laws have been challenged as being unreasonable, but in which the courts have disallowed the challenge, and held them reasonable. For some of these the writer is indebted to a learned note of Judge Dillon,[6] but for a greater number of them to the learned and extensive note of Mr. Freeman in 34 American Decisions, 634. The following municipal by-laws have been held not unreasonable: Forbidding the placing or carrying of *signboards* on the sidewalks;[7] forbidding *preaching*, lecturing, etc., on a public common;[8] imposing an annual *license* of $500 on *express companies*, whose business extends beyond the limits of the State, and $100 on companies whose business is conducted within the State;[9] prohibiting railroad trains from standing across a public street for more than two minutes at a time;[10] forbidding *wagons* loaded with perishable produce to stand in the *market place* for more than twenty minutes between certain hours;[11] prohibiting persons from *driving* wagons and carts *on a trot* or gallop in the streets;[12] prohibiting persons who are not lessees of butchers' stalls from offering for *sale fresh meat* in less quantities than one quarter;[13] prohibiting the owners of lots on the *lake front* from removing sand therefrom;[14] prohibiting the building of *awnings;*[15] prohibiting *restaurants* from being kept open after

[1] Teutonia Ins. Co. *v.* O'Connor, 27 La. An. 371.

[2] Wreford *v.* People, 14 Mich. 41.

[3] Beroujohn *v.* Mobile, 27 Ala. 58.

[4] Pieri *v.* Mayor, 42 Miss. 493.

[5] Com. *v.* Wilkins, 121 Mass. 356.

[6] Dill. Mun. Corp. (4th ed.), § 319, note.

[7] Com. *v.* McCafferty, 145 Mass. 384. Com. *v.* Davis, 140 Mass. 485.

[9] Southern Express Co. *v.* Mobile, 49 Ala. 404. It is thought that this by-law would be void, under the Federal constitution, as being a regulation of commerce among the States. See Welton *v.* Missouri, 91 U. S. 275.

[10] State *v.* Jersey City, 37 N. J. L. 348.

[11] Com. *v.* Brooks, 109 Mass. 355.

[12] Com. *v.* Worcester, 3 Pick. (Mass.) 461.

[13] St. Louis *v.* Weber, 44 Mo. 547.

[14] Clason *v.* Milwaukee, 30 Wis. 316.

[15] Pedrick *v.* Bailey, 12 Gray (Mass.), 161.

ten o'clock p. m.;[1] imposing a fine on the owner of a *ferocious dog*, which shall bite any person, etc.;[2] prohibiting drivers of *hackney coaches* from standing their carriages within thirty-five feet of the front doors of places of public amusement;[3] fixing the price at which private persons may be permitted to tap a *public* sewer;[4] fixing *market hours* at from dawn to 9 o'clock a. m., and providing that fresh beef shall not be sold at any other than the market place during such hours, in quantities or portions smaller than a quarter;[5] requiring *railroad companies* to station *flagmen* at street crossings and to use lighted lanterns at night;[6] prohibiting *cattle* from being allowed to run at large within the corporate limits;[7] prohibiting the keeping of *swine* within such limits;[8] levying a *tax* of $150 on every retailer of *spirituous liquors;*[9] compelling *boats* loaded with vegetables or putrid substances, coming from places infected with malignant or *contagious diseases*, to anchor in the river until examined by the city physician;[10] forbidding the keeping of *gunpowder*, except in certain quantities, within the corporate limits, and providing that it shall be kept in copper canisters, and imposing a fine of not less than fifty nor more than five hundred dollars for the violation of the ordinance;[11] requiring a *license* fee of $500 from retailers of *ardent spirits;*[12] punishing *vagrants;*[13] forbidding *sales* of merchandise after 9 o'clock a. m. on *Sunday;*[14] requiring *saloons* to close at 9 o'clock p. m.;[15] imposing a penalty on *retail grocers* for having *spirituous liquors* on their premises without a license;[16] authorizing the mayor to grant *licenses* to sell and deliver *milk*, and declaring the act of selling milk without such license a misdemeanor;[17] preventing the establishment of new *burial grounds* within the city;[18] requiring all places where *intoxicants* are sold to be closed at half-past ten p. m.;[19] authorizing commissioners to vacate or discontinue leasing or hiring *market stalls;*[20] prescribing streets as routes

[1] State *v.* Freeman, 38 N. H. 426.

[2] Com. *v.* Steffee, 7 Bush (Ky.), 161.

[3] Com. *v.* Robertson, 5 Cush. (Mass.) 438.

[4] Fisher *v.* Harrisburg, 2 Grant Cas. (Pa.) 291.

[5] Bowling Green *v.* Carson, 10 Bush (Ky.), 64.

[6] Delaware &c. R. Co. *v.* East Orange, 41 N. J. L. 127.

[7] Com. *v.* Bean, 14 Gray (Mass.), 52.

[8] Com. *v.* Patch, 97 Mass. 221.

[9] Mayor *v.* Beasley, 1 Humph. (Tenn.) 232; *s. c.* 34 Am. Dec. 646.

[10] Dubois *v.* Augusta, Dudley (Ga.), 30.

[11] Williams *v.* Augusta, 4 Ga. 509.

[12] Perdue *v.* Ellis, 18 Ga. 586.

[13] St. Louis *v.* Bentz, 11 Mo. 61.

[14] St. Louis *v.* Cafferata, 24 Mo. 94.

[15] Smith *v.* Mayor, 3 Head (Tenn.), 245.

[16] Council *v.* Ahrens, 4 Strobh. L. (S. C.) 241.

[17] People *v.* Mulholland, 82 N. Y. 324.

[18] Charleston *v.* Baptist Church, 4 Strobh. L. (S. C.) 306.

[19] State *v.* Welch, 36 Conn. 215.

[20] Charleston *v.* Goldsmith, 2 Speer (S. C.), 428.

of travel for omnibusses, and providing for their exclusion from other streets;[1] requiring *drawbridges* crossing a river to be closed every ten minutes for the passage of persons and vehicles, and making it unlawful for navigators to attempt to pass after the signal has been displayed that the bridge is being closed;[2] providing that any person who shall unnecessarily obstruct or impede the running of *street cars*, by standing his team across the track, or otherwise shall be liable to a fine;[3] requiring *hackmen* standing their hacks at or near a railway station to obey the directions of police officers;[4] prohibiting persons without a license from carrying *offal* or *house dirt* through any of the streets.[5]

§ 1026. By-laws Touching the Admission of Persons to the Freedom of a Place. — It will be necessary, at the outset, for the reader to have some idea of what is understood to be the meaning of admitting a person to the freedom of a corporation. Many of the corporations spoken of in the early English books of reports were trade-guilds, which had come down from the middle ages, or which had been modeled after the guilds of those periods. These guilds enjoyed certain powers, either by royal charter or by prescription which presumed the existence of a charter. Among these powers was the power of admitting members to their *freedom*, that is to the enjoyment of their franchises or privileges. The chief privilege of one of these trade corporations appears to have been the privilege of pursuing the particular art, craft or trade with which the company was concerned. In many cases the prerequisite to the right to be admitted to such freedom was a service for the period of seven years as an *apprentice*, under a *freeman* of the particular company, to learn the trade, art or mystery of the company. Thus, in the case of the tailors of Ipswich, there was a by-law that "none should work at his trade until he had presented himself to the company of tailors," and "should prove that he had served seven years at the least, as an apprentice, and before he should be admitted by them to be a sufficient workman." This by-law was held to be void, as being against law. It was against the statute of 5 Eliz. relating to apprenticeships, and was a further *restraint of trade* than had been created by that statute.[6] In the case of the company or fraternity of freemasons, rough masons, wallers, paviours, plaisterers, platers, and brick-layers, of the city of Durham, there was a by-law to the general effect that no person should be admitted a freeman of the company

[1] Com. *v.* Stodder, 2 Cush. (Mass.) 562.

[2] Chicago *v.* McGinn, 51 Ill. 266.

[3] State *v.* Foley, 31 Iowa, 527; *s. c.* 7 Am. Rep. 166.

[4] St. Paul *v.* Smith, 27 Minn. 364.

[5] Re Vandine, 6 Pick. (Mass.) 187; *s. c.* 17 Am. Dec. 351.

[6] Case of the Tailors of Ipswich, 11 Coke, 53.

until he should have been called, at three several meetings of the mayor and certain aldermen of the city, and the wardens and stewards of the several companies within the city, before his admittance, and that he be approved of by them and by the majority of them. This was held, in a judgment given by Lord Mansfield, in which a great many objections were stated and answered, to be a good by-law.[1]

§ 1027. By-Law Compelling Elected Members to Wear Livery and Pay Initiation Fee or a Forfeiture.— A by-law of the Vintner's Company was, in substance, that the company might elect such of the yeomanry of their members as should seem most meet and convenient to them into the livery of their company, and that every person so elected should pay to the company for his admission into the livery, the sum of £31 13*s.*, 4*d.*, and on his refusal to accept the same and to pay the fee, should forfeit the sum of £25. This by-law was, in several cases adjudged to be reasonable and valid.[2] To the answer that this by-law was grievous to the subject, the court resolved: "Was the same more or less, it could not make the by-law void, for it is to bind only the members of the corporation; and when a man will agree to be of a company, he doth thereby submit himself to the laws thereof, and we are not to take notice of the extravagancy of the charges they lay upon themselves. And it is convenient that the company have such power to keep up their reputation and the honor of the city of London; and so allowed the return to be good."[3] Lord Mansfield, however, was of opinion that a plea of *nil debit* might be supported by evidence, if the defendant was really unfit to take the livery, and this he said "holds as to any reasonable excuse," but the judges were agreed that the court would not intend, for the purpose of defeating the by-law, that the defendant was an improper person to receive the livery. Mr. Justice Dennison said: "It is objected that a person elected may be a beggar. But we can never intend that they would choose persons not meet and convenient; and if this be done *nil debit* will bring that question before the court. . . . This is an ancient by-law, and nothing unreasonable appears upon the face of it."[4]

§ 1028. Must not be in Restraint of Trade. — As a general rule, by-laws which operate in restraint of trade are void, as

[1] Green *v.* Mayor of Durham, 1 Burr. 127.

[2] Vintner's Co. *v.* Passey, 1 Burr. 235; Taverner's Case, Sir T. Raym. 446.

[3] Taverner's Case, Sir T. Raym. 446.

[4] Vintner's Co. *v.* Passey, 1 Burr. 235, 239, 240.

against public policy;[1] and this is true of *municipal ordinances*, which, as already seen, stand on the same general footing as the by-laws of private corporations.[2] On the same principle, municipal by-laws *tending to create monopolies*, or to vest in particular persons the sale and exclusive right to carry on particular kinds of business, are void.[3] By-laws prohibiting an inhabitant

[1] Sayre *v.* Louisville &c. Asso., 1 Duv. (Ky.) 143; *s. c.* 85 Am. Dec. 613; Re Butchers' Beneficial Asso., 35 Pa. St. 151; Moore *v.* Bank of Commerce, 52 Mo. 377; Clark *v.* Le Cren, 9 Barn. & Cres. 52; Chouteau Spring Co. *v.* Harris, 20 Mo. 383; Quinier *v.* Marblehead &c. Co., 10 Mass. 476.

[2] St. Paul *v.* Traeger, 25 Minn. 248; State *v.* Fisher, 52 Mo. 174; St. Louis *v.* Grone, 46 Mo. 574; Hayes *v.* Appleton, 24 Wis. 543. It has been so held of an *ordinance* restraining a dealer in groceries from selling vegetables at his place of business during market hours. Caldwell *v.* Alton, 33 Ill. 416. It is upon this ground that the American courts proceed, which deny the right to municipal councils to establish that species of tax known in Europe as an *octroi*, that is, a tax laid upon the producers of country produce who bring it into the city for sale,—instances of which have been already given. *Ante*, § 1017. The principle does not extend so far as to invalidate an ordinance requiring the taking out of a license by persons engaged in transporting *coal* in wagons from point to point within a city (Gartside *v.* East St. Louis, 43 Ill. 47); nor an ordinance prohibiting all hawking and *peddling* about the street of *meat*, game and poultry (Shelton *v.* Mobile, 30 Ala. 540); nor an ordinance providing that no person should keep a *butcher's stall* or vend fresh meats in less quantities than the quarter, without paying a license tax of $200. St. Paul *v.* Colter, 12 Minn. 41. And so, the keeping of markets within certain prescribed limits may be forbidden. State *v.* Gisch, 31 La. An. 544.

[3] Gale *v.* Kalamazoo, 23 Mich. 344; *s. c.* 9 Am. Rep. 80; Logan *v.* Pyne, 43 Iowa, 524; *s. c.* 22 Am. Rep. 261; Chicago *v.* Rumpff, 45 Ill. 90; Tugman *v.* Chicago, 78 Ill. 45. It has been said, but the conclusion must be doubted, that the power to grant or refuse licenses, will enable the corporation to grant an exclusive license. Burlington Ferry *v.* Davis, 48 Iowa, 133. See Norwich Gaslight Co. *v.* Norwich City Gas Co., 21 Conn. 19; *ante*, § 647. In the case of ferries, gaslight companies, street car companies and the like, where the undertaking involves a large expenditure of money and the chances of pecuniary success are doubtful, there may be great propriety in conferring upon the adventurers, who are willing to risk their capital in the enterprise, an exclusive franchise for a limited period of time; but it is believed that the power to make the franchise exclusive does not exist in a municipal corporation, unless it is expressly granted by the State; and, as already seen, in some of the States the legislatures are prohibited by the constitution from granting such franchises. *Ante*, § 647. The better opinion is that a power to *license* is not a power to *prohibit*, but merely a power to *regulate* and to *tax*. Youngblood *v.* Sexton, 32 Mich. 406; *s. c.* 20 Am. Rep. 654; Kip *v.* Paterson, 26 N. J. L. 298; Leavenworth *v.* Booth, 15 Kan. 627; East St. Louis *v.* Wehrung,

of the city not offering for sale the produce of his own farm, from occupying designated market stands for the sale of such produce, are valid.[1]

§ **1029. The Ancient Law on this Subject.** — The leading case upon this subject appears to be the case of the Tailors of Ipswich,[2] where, upon the facts which seem not necessary to be stated, it was held that a by-law of a corporation preventing a person from working at his trade of tailor, who had not served an apprenticeship of seven years, was void. The report recites that: "This case, upon argument at the bar and bench, divers points were resolved: 1. That at the common law no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil, *otium omnium vitiorum mater*, especially in young men, who ought in their youth (which is their seed time), to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies which prohibit any from working in a lawful trade; and that appears in 2 H. 5. 5 *b*. A dyer was bound that he should not use the dyer's craft for two years, and there Hull (a judge) held, that the bond was against the common law, and by G—d if the plaintiff was here he would go to prison till he paid a fine to the King. So, and for the same reason, if any husbandman is bound that he shall not sow his land, the bond is against the common law. And *vide* 7 Ed. 3 65 *b*. And if he who takes upon him to work is unskillful, his ignorance is a sufficient punishment to him; for *imperitia*

46 Ill. 392; Addison *v.* Saulnier, 19 Cal. 82; Carter *v.* Dow, 16 Wis. 298; Welch *v.* Hotchkiss, 39 Conn. 140; *s. c.* 12 Am. Rep. 383; State *v.* Hoboken, 33 N. J. L. 280; North Hudson R. Co. *v.* Hoboken, 41 N. J. L. 71; Johnston *v.* Macon, 62 Ga. 645; Johnson *v.* Philadelphia, 60 Pa. St. 445; Goshen *v.* Kern, 63 Ind. 468; Ash *v.* People, 11 Mich. 347; Chilvers *v.* People, *Id.* 43; People *v.* Mayor, 7 How. Pr. (N. Y.) 81; St. Louis *v.* Bircher, 7 Mo. App. 169; St. Louis *v.* Boatmen's Insurance Co., 47 Mo. 150; St. Louis *v.* Marine Ins. Co., 47 Mo. 163; New York *v.* Second Avenue R. Co., 32 N. Y. 261. The power conferred upon a corporation by its charter to regulate *markets*, carries with it the power to enact reasonable ordinances prohibiting sales of marketable articles elsewhere than in the public markets during market hours. Buffalo *v.* Webster, 10 Wend. (N. Y.) 100; Bush *v.* Seabury, 8 Johns. (N. Y.) 418; Dunhan *v.* Rochester, 5 Cow. (N. Y.) 462; Bowling Green *v.* Carson, 10 Bush (Ky.), 64; St. Louis *v.* Jackson, 25 Mo. 37; St. Louis *v.* Weber, 44 Mo. 547; Le Claire *v.* Davenport, 13 Iowa, 210; Davenport *v.* Kelly, 7 Iowa, 102. *Contra:* Caldwell *v.* Alton, 33 Ill. 416; Bloomington *v.* Wahl, 46 Ill. 489; Bethune *v.* Hughes, 28 Ga. 560.

[1] Re Nightingale, 11 Pick. (Mass.) 168. And see Com. *v.* Rice, 9 Metc. (Mass.) 253.

[2] 11 Coke, 53.

est maxima mechanicorum pœna, et quilibet quærit in qualibet arte peritos: And if any one takes upon him to work, and spoils it, an action on the case lies against him. And the statute of 5 Eliz. 4, which prohibits every person from using or exercising any craft, mystery or occupation, unless he has been an apprentice by the space of seven years, was not enacted only to the intent that workmen should be skillful, but also that youth should not be nourished in idleness, but brought up and educated in lawful sciences and trades. And thereby it appears that without an act of parliament, none can be in any manner restrained from working in any lawful trade. Also the common law doth not prohibit any person from using several arts or mysteries at his pleasure, *nemo prohibetur plures negotiationes sive artes exercere*, until it was prohibited by act of parliament of 37 Ed. 3 cap. 6. *scil.* That the artificers and people of mystery hold themselves every one to one mystery, and that none use other mystery than that which he has chosen; but this restraint of trade and traffic was immediately found prejudicial to the commonwealth, and therefore at the next parliament it was enacted, that the people should be as free as they were at any time before the said ordinance. 2. That the said restraint of the defendant, for more than the said act of 5 Eliz. has made, was against law, and therefore for as much as the statute has not restrained him who has served as an apprentice for seven years from exercising the trade of a tailor, the said ordinance cannot prohibit him from exercising his trade, till he has presented himself before them, or till they allow him to be a workman; for these are against the liberty and freedom of the subject, and are a means of extortion in drawing money from them, either by delay or some other subtle device, or of oppression of young tradesmen, by the old and rich of the same trade, not permitting them to work in their trade freely, and all this is against the common law, and the commonwealth; but ordinances for the good order and government of men of trades and mysteries are good, but not to restrain any one in his lawful mystery. 3. It was resolved that the said branch of the act of 5 Eliz. is intended of a public use and exercise of a trade to all who will come, and not of him who is a private cook, tailor, brewer, baker, etc., in the house of any for the use of a family; and therefore if the said ordinance had been good and consonant to law, such a private exercise and use had not been within it, for every one may work in such a private manner, although he has never been an apprentice in the trade. 4. It was resolved that the statute of 19 H. 7. 7. doth not corroborate any of the ordinances made by any corporation which are so allowed and approved as the statute speaks, but leaves them to be affirmed as good, or disaffirmed as unlawful by the law, the sole benefit which the incorporation obtains by such allowance is, that

they shall not incur the penalty of £40 mentioned in the act, if they put in use any ordinances which are against the king's prerogative, or the common profit of the people, etc. And judgment was given *quod querentes nihil caperent per billam.*" - - - - A good many cases are found touching the validity of the by-laws of ancient trade corporations, which restrained, to a greater or less degree, the right of their members or others to pursue the trade, art, or craft of the corporation. Thus, in an action of debt upon a by-law of a corporation, known as master wardens and assistants of silk throusters, which provided that no man should exceed 160 spindles that was no assistant, and that no man who was an assistant should have more than 240 spindles under pain of 3£ 10s, the by-law was held not to be bad, as being unreasonable or in restraint of trade.[1] But the case does not seem to have clearly presented the question.

§ 1030. By-Laws Establishing Combinations among Workmen to Maintain Prices.— It seems that a by-law of an incorporated association of workmen, having the effect of maintaining *reasonable prices* for the work performed by the members of the association, but without interfering with the freedom of contract of the individual members, or interposing the mere will of the association for the views of the individual in determining what price is reasonable,— would be unobjectionable, and would not be set aside as unreasonable, or opposed to sound morals or public policy.[2]

[1] Silk Throusters *v.* Fremantee, 2 Keb. 309.

[2] See the reasoning of Bullitt, J., in Sayre *v.* Louisville &c. Asso., 1 Duv. (Ky.) 143; *s. c.* 85 Am. Dec. 613. The learned judge quoted, with seeming approval, the following observations of Mr. Justice Erle to a jury: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand, . . . but I consider the law to be clear so far only as, while the purpose of the combination is to obtain a benefit for the parties who combine,— a benefit which, by law, they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to

§ 1031. Regulating or Restraining Transfers of Shares. — Closely allied to the foregoing is a class of by-laws established by joint stock corporations, regulating and sometimes restraining, transfers of shares of the corporate stock. As such shares are personal property, and as the right to sell property is a necessary incident of its ownership, a by-law which should *absolutely restrain* the right of a shareholder to dispose of and transfer his shares would be void as against common right, as being opposed to the law of the land, and also as being in restraint of trade. But by-laws which merely *regulate* such transfers, or even *restrain* them, so far as necessary to secure the rights of the corporation, and which do not otherwise operate unreasonably or in restraint of trade, are generally upheld. Where the charter of a bank authorizes its board of directors to make rules regulating trans-

combine with others to promote their mutual advantage." Reg. *v.* Rowlands, 17 Q. B. 671, 686, note *a; s. c.* 79 Eng. Com. L. 685, note *a*. Mr. Justice Bullitt understood the doctrine of this case to be that, as a workman who is bound by no contract may lawfully demand any wages that he may choose, any number of workmen may lawfully combine for the same purpose; and he regarded the reasoning of Chief Justice Shaw in Com. *v.* Hunt, 4 Met. (Mass.) 111; *s. c.* 38 Am. Dec. 346, as leading to the same conclusion, though the precise point was not decided. That long and tedious decision holds, among other things, that the purpose of a society, organized under an agreement not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman, is not necessarily unlawful. In Bowen *v.* Matheson, 14 Allen (Mass.), 499, 503, this last case is cited in support of the conclusion that an agreement between members of a society not to ship sailors at less than a specified rate of wages, is not criminal. The case of People *v.* Fisher, 14 Wend. (N. Y.) 19; *s. c.* 28 Am. Dec. 501, holding, under a statute of that State, that all combinations of workmen to raise wages are necessarily injurious to trade and indictable as misdemeanors, has generally been regarded as depending for its support alone on the statute and as expounding a doctrine which is not to be transplanted into other jurisdictions except by legislation. The sound view seems to be that such a combination is not unlawful or opposed to public policy, unless its effect is to enhance prices *to an unreasonable extent* (Sayre *v.* Louisville &c. Asso., *supra*); or unless it is attempted to accomplish such results *by unlawful means*. Com. *v.* Hunt, *supra;* Snow *v.* Wheeler, 113 Mass. 179, 186. Moreover, where an association is formed for such a purpose, and its powers are afterwards abused by its members, only those so abusing them are responsible. Com. *v.* Hunt, *supra;* Carew *v.* Rutherford, 106 Mass. 1, 10. As to conspiracies to control workmen, see People *v.* Fisher, 14 Wend. (N. Y.) 1; *s. c.* 28 Am. Dec. 501, and especially note 28 Am. Dec. 507, where the subject is discussed at length.

fers of its stock, a by-law adopted by them, forbidding the transfer of stock so long as the owner is indebted to the bank, is valid, although inconsistent with the general law of the State governing the transfer of property.[1] On the other hand, a by-law of a company, the shares of the stock of which are personal and assignable property, requiring transfers to be made only at its office personally, or by attorney with consent of the president thereof, has been held contrary to the general laws of Massachusetts respecting the transfer of the right of personal property.[2] Accordingly, an assignment of shares by the vendor's deed, accompanied by a delivery of the certificates to the vendee, without any transfer on the books of the corporation, was valid, not only between vendor and vendee, but against a creditor of the vendor, who attached the shares before he or the treasurer had notice of the transfer.[3]

§ 1032. Creating a Lien upon Shares.—According to the weight of authority, a by-law creating a *lien* on the shares of a member, for debts due by him to the corporation, is valid and binding,[4] though not as against *innocent purchasers* for value.[5]

§ 1033. Releasing Shareholders from their Obligation of Payment.—The capital stock of a corporation being a *trust fund*

[1] Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; *s. c.* 100 Am. Dec. 388; cited and approved in Spurlock *v.* Pacific R. Co., 61 Mo. 326; distinguished in Carroll *v.* Mullanphy Savings Bank, 8 Mo. App. 253. Farmers' &c. Bank *v.* Wasson, 48 Iowa, 339; Chouteau Spring Co. *v.* Harris, 20 Mo. 383; Moore *v.* Bank of Commerce, 52 Mo. 377; Quiner *v.* Marblehead &c. Co., 10 Mass. 476.

[2] Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90; *s. c.* 19 Am. Dec. 306.

[3] Sargent *v.* Essex Corp., 9 Pick. (Mass.) 202; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90; *s. c.* 19 Am. Dec. 306.

[4] People *v.* Crockett, 9 Cal. 112; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; Spurlock *v.* Pacific R. Co., 61 Mo. 319; Farmers' &c. Bank *v.* Wasson, 48 Ia. 339; Planters' &c. Ins. Co. *v.* Selma Savings Bank, 63 Ala. 585; Lockwood *v.* Mechanics' National Bank, 9 R. I. 308; Young *v.* Vough, 23 N. J. Eq. 325; Bank of Holly Springs *v.* Pinson, 58 Miss. 421; Pendergast *v.* Bank of Stockton, 2 Sawyer (U. S.), 108; Knight *v.* Old National Bank, 3 Cliff. (U. S.) 429.

[5] Anglo-California Bank *v.* Grangers' Bank, 63 Cal. 359; Driscoll *v.* West Bradley &c. Co., 59 N. Y. 96; Conklin *v.* Second National Bank, 45 N. Y. 655; Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Carroll *v.* Mullanphy Savings Bank, 8 Mo. App. 249; Pitot *v.* Johnson, 33 La. An. 1286; Bullard *v.* Bank, 18 Wall. (U. S.) 589; Bank *v.* Lanier, 11 Wall. (U. S.) 369.

for the security of its creditors, and the sums remaining unpaid by the holders of the shares of such stock in respect of their shares being a part of such trust fund,—it follows that a by-law of a manufacturing corporation, allowing the stockholders, on paying 30 per cent. of their shares, to forfeit their stock is void as against creditors.[1] Where a creditor, who was a trustee of the corporation, openly protested against such by-law, though he accepted money raised under it, and was present at a subsequent meeting of the trustees, when the application of the money was directed, and to which he assented,—it was held that this was not a *ratification* by him of the by-law.[2] A by-law of such a corporation, that any stockholder paying 50 per cent. of his shares shall be discharged from all future calls on his subscription, except by way of forfeiture, has been held valid; and those who had complied with the terms of such by-law, before the dissolution of the corporation, were held to be discharged from all responsibility to creditors.[3]

§ **1034. Restricting the Right to Sue in the Courts.**—The right to appeal to the courts of justice for the redress of injuries is a right which is open to all persons by the principles of the common law, and it is an established principle of that law that parties cannot, by a mere agreement, either confer jurisdiction upon the courts, or oust them of their jurisdiction over the subject-matter of particular actions.[4] Accordingly, it has been held that a by-law of an insurance company, providing that any suit on the policy should be brought *in a certain county* is not binding on the assured,[5] though it is held otherwise in respect of a by-law creating, so to speak, a statute of *limitation* in respect of the particular demand, that is, prescribing that suits to enforce it must be brought within a certain time, the time not being

[1] Slee *v.* Bloom, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273.

[2] *Ibid.*

[3] Slee *v.* Bloom, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273.

[4] Insurance Company *v.* Morse, 20 Wall. (U. S.) 445; Scott *v.* Avery, 5 H. L. Cas. 811. On the same principle, a *custom* that a party having a claim due upon contract may not pursue the remedies provided by law to collect it is not a good custom. Spears *v.* Ward, 48 Ind. 541; Manson *v.* Grand Lodge, 30 Minn. 509.

[5] Nute *v.* Hamilton &c. Ins. Co., 6 Gray (Mass.), 174.

unreasonably short.[1] For like reasons, it has been held that the holder of a relief fund certificate in a mutual benefit society is not bound to exhaust, within the society, the remedies provided by its constitution and by-laws, before resorting to the judicial courts to assert the rights given him by such certificate.[2] But the power is generally conceded to mutual benefit societies to provide, by by-laws, for the redress of grievances; and the decision of controversies arising in respect of rights in the particular society before the judicatories of the society, and by prescribed methods of procedure, before invoking the power of the courts.[3] Indeed, as already seen, this principle extends so far, not only in respect of these societies, but in respect of religious societies, merchants' exchanges, and all other corporations established for mutual benefit or for merely ideal purposes, and not merely for the carrying on of business by means of a joint stock, as to require members of such societies, who have grievances in respect of their rights therein, to exhaust the remedies provided by the rules of the society before the corporate judicatories, before the judicial courts will open their doors to them.[4] Some courts have gone so far as to hold, but upon grounds which must be regarded as doubtful, that such a society may prohibit actions at law altogether, by their members in respect of rights in the society, and may make its own decisions conclusive.[5] But it will appear that these decisions, when analyzed, assert no other principle than that, where such a society, proceeding without fraud, within the limits of its charter, by the methods prescribed by its rules of procedure, the same being consistent with the principles of the common law, adjudicates in respect of the rights of a member within the society,—such adjudication is final, and not subject to review by the judi-

[1] Amesbury *v.* Bowditch &c. Ins. Co., 6 Gray (Mass.), 596; Wilson *v.* Ætna Ins. Co., 27 Vt. 98; Gray *v.* Hartford Fire Ins. Co., 1 Blatchf. (U. S.) 280.

[2] Supreme Council *v.* Garrigus, 104 Ind. 133.

[3] Lafond *v.* Deems, 81 N. Y. 508; White *v.* Brownell, 2 Daly (N. Y.), 329; Harrington *v.* Workingmen's &c. Asso., 70 Ga. 340; Poultney *v.* Bachman, 31 Hun (N. Y.), 49; Bauer *v.* Samson Lodge, 102 Ind. 262; *s. c.* 13 Am. & Eng. Corp. Cas. 618.

[4] *Ante*, §§841, 912.

[5] Anacosta Tribe *v.* Murbach, 13 Md. 91; *s. c.* 71 Am. Dec. 625; Osceola Tribe *v.* Schmidt, 57 Md. 98; Black and White Smiths' Society *v.* Vandyke, 2 Whart. (Pa.) 309; *s. c.* 30 Am. Dec. 263.

cial courts.[1] If, however, the by-laws of the society make no provision for a tribunal to decide controversies arising between the society and its members, and a member is injured by the failure of the society to fulfill its contract to pay benefits, he may maintain an action at law against it for a redress of the injury.[2]

§ 1035. Compelling Members to Submit their Disputes to Arbitration. — Upon the foregoing grounds, it has been held that a by-law of an incorporated merchants' exchange, which compelled its members to submit their disputes to arbitration, is unreasonable and void; since it has the effect of contracting away the right which every person has of seeking redress of grievances in the judicial courts, according to the law of the land.[3] Upon the same principle, it has been held in early cases that by-laws prohibiting members of *municipal corporations* from pursuing their legal remedies beyond the jurisdiction of the corporation are void; since no power less than that of the legislature can deprive the subject or citizen of his right to legal redress.[4] In an old case in Dyer[5] the facts were that Middleton, a citizen and haberdasher of London, sued Osborne, another citizen and lately his journeyman, in debt on a bond, and was condemned, for which suit and costs he would not stand to arbitration and by order of Sir Lionel Ducat and Sir Rowland Hardy, Knights, aldermen of said city, he was disfranchised, upon which he sued for restoration to his freedom in the Queen's Bench, and was restored. Somewhat in line with these decisions, it has been held that a clause in the constitution of an unincorporated association requiring the members to submit their controversies to *arbitration*, has only the force and effect of a *private agreement* and like such an agreement is *revocable*.[6]

§ 1036. Power to Enforce by Pecuniary Fines.— In general, it may be said that corporations have the power to enforce their

[1] *Ante*, § 914, *et seq.*

[2] Dolan *v.* Court Good Samaritan, 128 Mass. 437.

[3] State *v.* Merchants' Exchange, 2 Mo. App. 96, 99.

[4] Player *v.* Archer, 1 Sid. 121; Ballard *v.* Bennett, 2 Burr. 778.

[5] Middleton's Case, Dyer, 333*a*.

[6] Heath *v.* New York Gold Exchange, 7 Abb. Pr. (N. Y.) (N. S.) 251; *s. c.* 38 How. Pr. (N. Y.) 168; and see Savannah Cotton Exchange *v.* State, 54 Ga. 668.

by-laws by pecuniary fines, provided the fines are *certain* and *not unreasonable* in amount, and do not amount to a *forfeiture* of property.[1] It is observed in an English work of reputation: "With respect to the mode of enforcing by-laws of corporations it has already been observed, that the power of enforcing by *penalties* is part of the power of making by-laws, which is incidental to all corporations, to the development of the objects of whose constitution such power is necessary; and in general the rule is, that a by-law, without an express act of parliament, can *only* be enforced by a pecuniary penalty, which must be certain;[2] the exception to the generality of the rule being the cases where by-laws have been allowed as being authorized by a *custom, ex gratia* in the city of London, although they purport to give power of imprisonment by way of enforcing them."[3] In an authoritative American work it is said: "The power to make by-laws necessarily supposes the power to enforce them by pecuniary penalties, competent and proportionable to the offense."[4] An old case, which questioned the validity of a by-law of the city of London in respect of trade in woolen goods, states the rule and the reason of it, thus: "Also the penalty inflicted on the offender be he citizen or stranger, was lawful, the offense being committed within the city, the same being competent and proportionable to the offense; and without a penalty the ordinance would be in vain: *oderunt peccare mali formidine poenæ.*"[5] It has always been understood in this country to be the law, that a corporation may make a reasonable and valid by-law, and annex a fine or

[1] Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124; *s. c.* 43 Am. Dec. 457, 462.

[2] Citing Bosworth *v.* Burgen, 7 Mod. 459; *s. c.* Lutw. 1324; Leathly *v.* Webster, Sayer, 252.

[3] Grant Corp. 84.

[4] Ang. & A. Corp., § 360.

[5] The Chamberlain of London's Case, 5 Co. Rep. 63*b*. In the City of London's Case, 8 Co. Rep. 241, 253, a similar doctrine is laid down. "A constitution cannot be made on pain of imprisonment; and the case cited before, of Trin. 41 Eliz. *inter* Waltham and Austen, that a constitution cannot be made on pain of forfeiture of goods, therefore it ought to be on a reasonable pecuniary pain or not at all." *s. c.* 3 Leon. 265. To the same effect see Mobile *v. v.* Yuille, 3 Ala. 137; *s. c.* 36 Am. Dec. 441. In Rex *v.* Newdigate, Comb. 10, it was "resolved that the city of London cannot set a fine, etc., for the non-performance of a by-law." But this seems clearly not to be law. But this doctrine was overthrown, as above seen, and has never been the law in this country.

penalty to its non-performance, which fine or penalty may be recovered by an action of debt. Indeed, this is the foundation of all recoveries of fines in the *police courts* of American towns and cities. Although the preceding has some of the incidents of a criminal proceeding, yet for many purposes it is regarded merely as an action for *debt* at common law, to recover a *penalty* annexed by a *by-law* to the doing or omitting of a particular act.

§ 1037. Cannot be Enforced by a Forfeiture of Property. — An exception to the foregoing rule is that a corporate by-law cannot be enforced by a forfeiture of the property of a defaulting member.[1] Accordingly, it was said that a municipal corporation cannot ordain the seizure and sale of a falling warehouse, constituting an obstruction in a public river, in case the owner refuses to remove it, under a clause in its charter giving it power to pass by-laws to remove such obstructions, and to enforce the same by penalties not exceeding a certain sum.[2] But this principle, when stated with reference to *municipal corporations*, must be understood with the qualification that it has been found necessary for the preservation of the public health from the calamities which would spring from epidemics, to vest in boards of health or other municipal or *quasi*-municipal bodies, the power to *condemn as nuisances* and to remove or destroy property the existence of which is plainly dangerous to the public health. This power rests on the footing of the abatement of public nuisances, and not on the footing of imposing forfeitures for the non-performance of corporate laws. A by-law of an incorporated society of tradesmen to the effect that every freeman using or not using said art, mystery or trade, should pay yearly to the company eight shillings, to be paid quarterly, and that every journeyman of the company should pay to the company four shillings, to be paid quarterly, and that every person refusing so to pay should forfeit twice the sum named, has been held bad, inasmuch as it did not appear that any rightful expenditure of

[1] Kirk *v.* Nowill, 1 T. R. 118. Compare Mayor &c. of New York *v.* Ordrenan, 12 Johns. (N. Y.) 122; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462; Stuyvesant *v.* Mayor &c. of New York, 7 Cow. (N. Y.) 588.

[2] Hart *v.* Albany, 9 Wend. (N. Y.) 571; *s. c.* 24 Am. Dec. 165, per Edmonds, senator.

the company required such a contribution.[1] But this principle does not extend so far as to involve a provision in a policy of *mutual insurance*, that it shall become void, in case default is made in the payment of assessments on the premium owned for the period of thirty days. This is a good condition, because it derives its force from the mutual consent of the parties, and is not *in invitum*.[2] Nor does it extend so far as to invalidate those by-laws of *mutual benefit societies*, which provide for a suspension from membership, or a forfeiture of membership and of the benefit certificate of the member, upon the non-payment of dues.[3] The reason is that members may contract among themselves for a forfeiture, the same not being opposed to express law or to public policy; and that in schemes of mutual insurance the integrity of the fund and the safety of the scheme depend upon each member complying with the rules by making the prescribed payments. Upon like grounds, the following by-law by a mutual insurance company was held valid: "Every member of this company shall be and hereby is bound and obliged to pay his portion of all losses and expenses happening and accruing in said company. And if any member shall, for the space of thirty days after the publication of notice as heretofore directed, neglect or refuse to pay the sum assessed upon him, her, or them, as his, her, or their, proportion of any loss as aforesaid, in such case the directors may sue for and recover the whole amount of his, her or their, deposit note or notes, with costs of suit; and the money thus collected shall remain in the treasury of said company, subject to the payment of such losses and expenses as have accrued or may thereafter accrue; and the balance, if any remain, shall be returned to the party from whom it was collected, on demand, after ninety days from the expiration of the term for which assurance was made." The court reasoned that it could not be deemed a forfeiture that a party was compelled to pay his note sooner than he would otherwise be liable to pay it, or to pay a larger amount than would otherwise be required. "The by-law," said Felch, J., "does not purport to compel him to pay more than the amount; but

[1] London Tobacco Pipe Makers Co. *v.* Woodroffe, 7 Barn. & Cress. 838, 853.

[2] Beadle *v.* Chenango &c. Ins. Co., 3 Hill (N. Y.), 161.

[3] *Post*, Title 21.

to enforce the collection of the whole, to be held in the treasury, for the payment of assessments due and to be thereafter made, — the balance, if any remain after the payment of such assessments, to be returned to him after the policy shall have expired. But when was the note payable? By its very terms it was payable in such portions and at such times as the directors of the company, agreeably to their act of incorporation, might require. Under the charter the whole premium might have been required in advance. If the directors require the whole amount to be paid at once, in case of delinquency in the payment of any installment, it seems to me to be precisely in accordance with the terms of the contract; and surely that cannot be deemed a forfeiture which provides for the collection of the sum agreed to be paid precisely according to the terms of that agreement." [1]

§ **1038. Nor by a Forfeiture of Shares.** — On the same principle, it is not competent for a corporation, unless the power is expressly given in its charter, to enforce a by-law by the penalty of a forfeiture of the shares of a member.[2] Thus, under a charter provision giving a corporation power "to make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and the transfer of its stock," it is not competent for the corporation to enact a by-law declaring that the *stock* of its members shall be *forfeited* for default in the payment of calls.[3] In this last case the doctrine was thus stated by Nelson, C. J.: "The corporation possesses the power to make by-laws *not inconsistent with any existing law*, for the management of its property, the regulation of its affairs, and the transfer of its stock.[4] This is the broadest general power conferred upon it; but it is not new, and would have existed as incidental. When taken as incidental it must be exercised in con-

[1] Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 126; *s. c.* 43 Am. Dec. 457, 462.

[2] That a by-law of a corporation cannot impose a forfeiture of shares of stock or of goods, or of any corporate interests as a penalty for its breach was held in Master Stevedore's Assoc. *v.* Walsh, 2 Daly, 1, 14; Rosenback *v.* Salt Springs National Bank, 53 Barb. (N. Y.) 495, 506, Re Long Island R. Co., 19 Wend. (N. Y.) 37; *s. c.* 32 Am. Dec. 429.

[3] Re Long Island R. Co., 19 Wend. (N. Y.) 37; *s. c.* 32 Am. Dec. 429.

[4] Citing the statute, 1 Rev. Stats. N. Y. 602; § 1, sub-sec. 6.

formity to the general law of the land, that being the rule to regulate the proceedings of *artificial bodies*, as well as the conduct of *natural persons*, independently of express provisions of the charters of those companies to the contrary. This general law has ascertained the rights of person and of property of the citizen, and established modes of proceeding in case of a violation of them; and *corporate bodies* must conform to them, in seeking redress, the same as individuals. The former can no more take the remedy into their own hands than can the latter. So strict has this salutary principle of subjection been held in England, that even a by-law in pursuance of an express power in a charter granted by the king, is void, if contrary to the common law or act of parliament.[1] Thus, a by-law imposing a forfeiture of goods is void, though the letters-patent authorized it; and a power granted to a corporation of dyers to search, and if they found cloth dyed with logwood to seize it as forfeited, was adjudged void as contrary to *Magna Charta*. On this same principle, by-laws in *restraint of trade* are adjudged void.[2] "So, a by-law that may be lawful cannot be enforced by an extraordinary penalty, such as imprisonment or forfeiture of goods, or by distress and sale of goods; for, by the general law of the kingdom, no man is to be imprisoned, or dispossessed of his goods and chattels *nisi per legale judicium parium suorum, vel per legem terræ*; and if such penalties were allowed, corporations would be enabled to set up private particular laws in contravention of the law of the land, which is against the nature and essence of a by-law."[3]

§ 1039. Otherwise where Power Expressly Conferred by Charter.—The power of a corporation to declare a forfeiture of its stock for the non-payment of calls or assessments, is upheld where the power is expressly given by charter. No decision, so

[1] Citing 1 Kyd Corp. 109; Will. Corp. 95; Ang. & A. Corp. 186; City of London's Case, 8 Coke Rep. 241; 2 Inst. 47; Kirk *v.* Nowill, 1 T. R. 118.

[2] Citing Tailors of Ipswich Case, 11 Coke Rep. 53; Harrison *v.* Godman, 1 Burr. 12; Woolley *v.* Idle, 4 Burr. 1951; Chamberlain of London *v.* Compton, 7 Dowl. & Ry. 601; 1 Bac. Abr. 547; Ang. & A. Corp. 184; Will. Corp. 142.

[3] Re Long Island R. Co., 19 Wend. (N. Y.) 37; *s. c.* 32 Am. Dec. 429, 433; citing to the last observation, Clark's Case, 5 Coke Rep. 64; Will. Corp. 98; 1 Bac. Abr. 551.

far as the writer is aware, goes to the length of holding that an act of the legislature, conferring upon a corporation such a power, is unconstitutional, as being in conflict with any provisions of our American constitutions which have been drawn from Magna Charta.[1]

§ 1040. **The Fine or Penalty Must be Certain.** — "The penalty must be a sum certain, and not left to the arbitrary assessment of the governing board of the company under the circumstances of the particular case, even though the utmost limit of the same be fixed; for this would be allowing a party to assess his own damages."[2] Thus, where the City of Mobile passed an ordinance providing for the licensing of the business of bakers, prescribing the character of the bread and the price of the loaves, etc., and annexed to its violation a fine *not exceeding $50*, it was said: "The by-law in this case being not for a sum certain, but for such sum, not exceeding $50, as the corporation court might think proper to impose as a fine, cannot be supported."[3] But in a subsequent case in the same State, a by-law imposing a fine not exceeding $50 for quarreling, wrestling, fighting, etc., was held good, the court saying: "A reasonable discretion is given, to be exercised within certain limits; and we can see no objection which could be urged to such a by-law, which could not, with equal propriety, be made to any law investing courts or juries with discretion in apportioning the fine to the offense, being restricted within reasonable bounds. The power of making just discriminations, so as to advance the ends of justice, and mete out to every violation of the law a punishment proportioned to its demerits, should reside somewhere; and since the charter invests the corporation with the power to pass such by-law, and to create proper sanctions, we do not conceive that the law in question is at all unreasonable, or uncertain, in

[1] Cases construing this power where conferred by statute: Jenkins *v.* Union Turnp. Co., 1 Caines Cas. (N. Y.) 86; Union Turnp. Co. *v.* Jenkins, 1 Caines Rep. 381; Goshen &c. Turnp. *v.* Hurtin, 9 Johns. (N. Y.) 218; *s. c.* 6 Am. Dec. 273; Andover &c. Turnp. Co. *v.* Gould, 6 Mass. 40; *s. c.* 4 Am. Dec. 80; Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.), 576; *s. c.* 5 Am. Dec. 638.

[2] Ang. & A. Corp., § 360; Wood *v.* Searl, J. Bridg. 139, 141; Scarning's Case, 3 Leon. 8; Mobile *v.* Yuille, 3 Ala. 137; *s. c.* 36 Am. Dec. 441.

[3] Mobile *v.* Yuille, *supra.*

that sense which renders it void."[1] This must be accepted as the prevailing view, especially as regards the by-laws of *municipal corporations*. It is believed that no very recent case can be found which has held a corporate by-law void for uncertainty, where it goes no further than to fix the *maximum* of the penalty. Such a by-law should be construed as fixing the penalty at the maximum, and committing to the corporate judicatory the power of mitigation, according to circumstances. On this principle a by-law with a penalty of *five pounds or less*, at the discretion and pleasure of the master and wardens, so that it be not less than forty shillings, has been held *not void* for uncertainty in respect of the amount of the penalty.[2] Baron Parke said: "In the absence of any other authority to the contrary, we do not see any objection to this mode of fixing the penalty. It is a certain penalty of five pounds, with a *power of mitigation* not below two pounds; and we do not think this is unreasonable."[3]

§ **1041. Making the Corporation a Judge in its Own Case.**— Nor is the view thrown out in one or two ancient cases[4] that the fixing of the penalty at a maximum with the power of making it less according to circumstances, has the effect of making the corporation a judge in its own case, in the sense which is opposed to the principles of the common law. Every corporation in the enforcement of its by-laws, must necessarily be in the first instance a judge in its own case, in the sense of these old cases; because it must necessarily determine, by some sort of a proceeding judicial in its nature, whether or not the by-law has been infringed, before it can impose the penalty thereby given. Such a principle would deny, not only to municipal corporations, but also to mutual benefit societies, religious societies, merchants' exchanges, social clubs, and many other private corporations and societies, the power to enforce through their constituted judicatories, their

[1] Huntsville *v.* Phelps, 27 Ala. 55, 58; overruling on this point Mobile *v.* Yuille, 3 Ala. 137; *s. c.* 36 Am. Dec. 441.

[2] Piper *v.* Chappell, 14 Mees. & W. 624 (explaining Wood *v.* Searl, J. Bridg. 141). In the case in J. Bridg. the penalty assessed by the by-law was a sum not exceeding forty shillings, and it was held to be bad; but Baron Parke pointed out, in Piper *v.* Chappell, that it might have been held bad upon other objections.

[3] Piper *v.* Chappell, 14 Mees. & W. 624, 649.

[4] See the preceding section.

valid rules and regulations, subject to the superintendence of the judicial courts. The view thrown out in the passage from Angell and Ames and other works on corporations that the by-law giving a discretion to the corporation as to the amount of the fine, makes the corporation a judge in its own case, was thus disposed of by the Supreme Court of Alabama: "That the corporation is made the judge in its own case is no objection, since it applies equally whether the penalty is for a specific sum, or fixed within certain limits. The question whether the ordinance has been violated, is to be determined, in either case, by the corporation."[1] In a case in the Court of Common Pleas of the City of New York, in which Daly, F. J., wrote the opinion of the court with his customary learning and discrimination, these principles were recognized, and a by-law of a corporation of which the defendant was a member called "The Master Stevedores' Association," to the effect that if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association twenty-five per cent. of the amount of such bill as fixed by the association, which penalty might be collected in the name of the corporation by due process of law,— was held not void for uncertainty, within the foregoing rule. While the court recognized the principle that a by-law of a corporation cannot be enforced by a forfeiture of goods, that being contrary to *Magna Charta*, they nevertheless regarded this by-law as not establishing a forfeiture but a pecuniary penalty merely, which was sufficiently certain.[2]

§ 1042. Views as to the Proper Measure of such Fines. — In a recent excellent work on the subject of building associations the following suggestions occur: "The proper measure of fines is the real damage the building association sustains from the failure of a member to pay his dues, which damage is really equal to the interest on the amount, together with the proportion coming to it from the then attainable premiums upon the sale of money. The fine should be slightly in excess of this, so as to make it more profitable to the member to pay promptly than to

[1] Huntsville *v.* Phelps, *supra.*

[2] Master Stevedores' Association *v.* Walsh, 2 Daly (N. Y.), 1, 14.

lag behind. . . . A fine of from one to two per cent. per month would, in nearly all cases, be sufficient and just." [1]

§ 1043. Illustrations: By-Laws of Building Associations Imposing Excessive Fines. — This principle has been applied to *building associations*, so as to invalidate by-laws of such associations which impose excessive fines upon their members for the non-payment of their monthly dues. Treating of this subject, in view of a statute of that State, the Supreme Court of Ohio have said: "It is to be regretted that the legislature was not more specific in making the grant of power thus intended to be conferred. . . . That there are limits, however, beyond which the corporation by its by-laws cannot go, is undoubted: 1. The amount of the fine must be reasonable. 2. It can be imposed only by way of punishment for some delinquency in the performance of a duty which the member may owe to the corporation by reason of his membership. 3. It is unreasonable, and therefore we assume that the legislature did not intend that more than one fine should be imposed for the same delinquency." [2] - - - - A by-law of a building association in Pennsylvania prescribed that "each and every stockholder or trustee who shall neglect or refuse to pay his monthly dues or interest as often as the same shall become due and payable, shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him." It was held that this by-law was unreasonable and extortionate, and thereby void. The court, speaking through Green, J., said: "It is clear the ten cents penalty or forfeiture is to be paid monthly. This being so, it is to be repeated every month during which the amount due remains unpaid. The effect of this would be that, if, at the end of December in any year, the member was indebted fifty dollars to the association, and remained so throughout the year following, he would then owe as a fine twelve times the original penalty on that one default; in other words, one hundred and twenty per cent. upon the principal sum for which default was made. In addition to this, he would also owe the full interest he might be paying on the amount expressed in his obligation, no matter how usurious that interest might be. Still further, as the balance is to be struck at the end of each month, the member would owe at that time all that he owed at the end of the

[1] Endlich Build. Asso., § 413; citing Ocmulgee &c. Asso., *v.* Thomson, 52 Ga. 427. The above language was approved by the Supreme Court of Pennsylvania in Lynn *v.* Freemansburg &c. Asso.. 117 Pa. St. 1; *s. c.* 2 Am. St. Rep. 639, 643.

[2] Hageman *v.* Ohio &c. Asso., 25 Oh. St. 186, 202; quoted with approval in Lynn *v.* Freemansburg &c. Asso., 117 Pa. St. 1; *s. c.* 2 Am. St. Rep. 639.

preceding month, and, in addition thereto, the interest and penalty for the current month, besides the dues; and the account would be made up by charging him with ten per cent. upon the principal, the interest and the fine due at the end of the preceding month, and adding them to the dues and interest of the current month. If another default was then made, the same process would be repeated at the end of each succeeding month during the continuance of the defaults. It is needless to enter into a detailed computation to show what the aggregate result of such a process would be in any given case. That it is unreasonable, extortionate, and oppressive to the last degree, must be at once conceded. If the monthly penalty were a hundred per cent. instead of ten, it would only be a difference in degree not in character. Of course, if there is an unlimited right to impose, by means of a by-law, any amount of fine or penalty which the association may please to ordain, and the law is powerless to interfere, the results must be accepted, no matter how unjust or oppressive they may be. But we do not so understand the law upon this subject." [1]

§ 1044. Imposing Fine for Non-Acceptance of a Corporate Office. — A by-law "that if *any person* who shall be chosen to be warden shall refuse to accept the office and take the oath, he shall forfeit 6*l.* 13*s.* 4*d.*," has been held a good by-law. The words any person, are understood to mean any person *eligible* by the terms of the charter to the office of warden. It is therefore not a good objection to such a by-law that the word persons is indefinite.[2] The propriety of such a fine was upheld by strong reasoning in an earlier case, in which the validity of a by-law of the corporation of London imposing a penalty for refusing to take the office of sheriff without reasonable excuse was held good. It was reasoned that, as the corporation was bound to nominate such officers every year under penalty of a forfeiture of its charter, some member must of necessity take the office; and it is manifestly a thing necessary, of common right, that there should be a coercive power in every corporation to compel their own members to submit to their constitution; and it will be a forfeiture of that charter, if the office of sheriff is not yearly supplied; and therefore, to prevent this mischief, it is of necessity that they should make by-laws concerning it; and now, the sheriffwick of Middlesex being, by the King's grant, annexed to the corporation, it must be executed by the members thereof, and be subject to their by-laws. . . . The excuse which this by-law gives is for

[1] Lynn *v.* Freemansburg &c. Asso., 117 Pa. St. 1; *s. c.* 2 Am. St. Rep. 639.

[2] London Tobacco Pipe Makers Co. *v.* Woodroffe, 7 Barn. & Cress. 838, 852 (overruling Mayor of Oxford *v.* Wildgoose, 3 Lev. 293).

the ease of the members of this corporation; otherwise nothing but an invincible incapacity could have excused a citizen who was elected sheriff.[1]

§ 1045. Imposing Fines for Non-Attendance at Corporate Meetings. — A by-law of an incorporated guild of tradesmen which imposed a fine on every master workman or assistant who should not attend the courts to be holden, has been held to be a *valid* by-law, — Lord Tenterden, C. J., saying: "To the subject-matter of these by-laws no legal exception can be made. Attendance at corporate assemblies, and acceptance of a corporate office, is a duty each member owes to the corporation to which he belongs." [2]

§ 1046. By-laws Regulating the Conduct of Members. — By-laws regulating the *conduct of members* of the corporation or society, and providing for trial, suspension and expulsion for misconduct are upheld by the court, when they do not violate any of the fundamental rules of right imbedded in the common law, or the constitutional or statute law of the State. Indeed it is the primary office and conception of a corporate by-law that it is a rule for the conduct of the members among themselves; a subject which has been considered in the next preceding chapter.[3]

§ 1047. Disinclination of the Courts to Interfere with the By-laws of Societies. — The by-laws of those corporations which might be classed under the general designation of *private societies*, to distinguish them from municipal or other public corporations on the one hand, and from strictly joint stock or pecuniary corporations on the other, are regarded as standing in the nature of *contracts* among the members, — engagements which they have voluntarily entered into for their own government. When these engagements are not opposed to express legal prohibition, or contrary to public policy, the courts manifest the same disinclination to interfere with them which they manifest toward interfering with other contracts. This is especially true of societies organized for ideal purposes, for the advancement of religion, morals,

[1] Rex *v.* Larwood, Carth. 306. See also London City *v.* Vanacker, Carth. 480, 483.

[2] London Tobacco Pipe Makers Co. *v.* Woodroffe, 7 Barn. & Cress. 838, 852.

[3] Flint *v.* Pierce, 99 Mass. 68, 70; *s. c.* 96 Am. Dec. 691; *ante*, § 849, *et seq.*

or for social purposes, or for the amusement of their members. It reaches, on the one hand, as far as chambers of commerce and merchants' exchanges, and on the other, takes in merely social clubs, incorporated or unincorporated.[1] If such by-laws prove to be inconvenient or embarrassing, this, it has been said, furnishes no excuse to the members for disobeying them, although it may suggest the expediency of altering them.[2]

§ **1048. Valid in Part and Void in Part.** — As in the case of a statute of the State, and in conformity with a rule elsewhere explained,[3] if a by-law consists of several distinct and severable parts, some of which are unauthorized and void, this does not affect the validity of the other parts. In other words, a by-law, like a statute, may be valid in part and void in part, and the bad may be rejected, where it is so far disassociated from the good as to lead to the conclusion that the good might have been enacted without the bad.[4] But where the bad and the good are so connected as to lead to the conclusion that the good portion would not have been enacted without the bad, the bad portion vitiates the whole and the whole must fall.[5] "Where a parcel of by-laws come before us together, some good and some bad, they may be severed; but not so where the sense is entire."[6] "Where a by-law is entire, each part having a general influence over the rest, if one part is void, the whole is void; but where a by-law consists of several distinct and independent parts, though one or more of them is void, the rest are valid. And this rule is applicable to the different clauses of the same by-

[1] See Loubat *v.* Leroy, 15 Abb. New Cas. (N. Y.) 1, and note, p. 44; Olery *v.* Brown, 51 How. Pr. (N. Y.) 92; People *v.* St. George's Society, 28 Mich. 261; Savannah Cotton Exchange *v.* State, 54 Ga. 668; Dawkins *v.* Antrobus, 17 Ch. Div. 615; Hussey *v.* Gallagher, 61 Ga. 86; People *v.* Board of Trade, 80 Ill. 134; Lafond *v.* Deems, 81 N. Y. 507, affirming judgment of General Term reversing the judgment of the Special Term, reported in 1 Abb. N. C. (N. Y.) 318 and 52 How Pr. (N. Y.) 41 (the decision of the General Term seems not to be reported).

[2] Weatherly *v.* Medical &c. Society, 76 Ala. 567.

[3] *Ante*, § 658.

[4] Shelton *v.* Mobile, 30 Ala. 540; *s. c.* 68 Am. Dec. 143; Amesbury *v.* Bowditch Mutual Ins. Co., 6 Gray (Mass.), 596; Cleve *v.* Financial Corp., L. R. 16 Eq. 363; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 260.

[5] *Ante*, § 658.

[6] Stationers of London *v.* Salisbury, Comb. 221, 222, per Lord Holt, C. J.

law; for where it consists of several particulars, it is, to all purposes, as several by-laws, though the provisions are thrown together under the form of one." [1] As already seen,[2] a corporate by-law sustains the dual character of a *law*, for the government of the members and the corporate concerns, and of a *contract* into which the members have voluntarily entered. The principle that it may be void in part and valid in part, has not only an analogy in respect of the constitutionality of acts of the legislature, but also an analogy in respect of the validity of private contracts.[3]

[1] Amesbury *v.* Bowditch Mutual Fire Ins. Co., 6 Gray (Mass.), 596, 607.

[2] *Ante*, §§ 930, 940.

[3] In Page *v.* Monks, 5 Gray (Mass.), 492, 495, it is said: "A contract is not necessarily void, or wholly inoperative, because it consists in part of promises and engagements for the breach and disregarding of which the statute neither affords nor allows any remedy by an action at law. In such cases, whether any of those promises or engagements can be enforced, must depend on the manner and extent of their connection and combination with the rest. If the contract is in its nature entire, and its parts are incapable of separation or division, then, though some of its stipulations are not, if others of them are affected by the statute, no action can be brought or maintained upon it. But it is otherwise if the parts are severable." In like manner, in Rand *v.* Mather, 11 Cush. (Mass.) 1; *s. c.* 59 Am. Dec. 131, 134, it is said by Metcalf, J.: "On principle, and according to numerous modern adjudications, the true doctrine is this: if any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant." Eastern R. Co. *v.* Benedict, 15 Gray (Mass.), 289, 292; Allen *v.* Leonard, 16 Gray (Mass.), 202; Haynes *v.* Nice, 100 Mass. 327, 329; Friend *v.* Pettingill, 116 Mass. 515, 517. See cases overruled in Loomis *v.* Newhall, 15 Pick. (Mass.) 159, where the contrary was decided on the authority of Lexington *v.* Clark, 2 Ventr. 223, and Chater *v.* Becket, 7 T. R. 201. Further cases expounding and illustrating this doctrine: Wood *v.* Benson, 2 Cromp. & J. 94; *s. c.* 2 Tyrw. 93; Newman *v.* Newman, 4 Maule & S. 66; Bank of Australasia *v.* Breilat, 6 Moore P. C. 152; Bishop of Chester *v.* Freeland, Ley, 71, 79; Norton *v.* Simmes, Hob. 14; Kerrison *v.* Cole, 8 East, 231, 236; Doe *v.* Pitcher, 6 Taunt. 359, 369; Mouys *v.* Leake, 8 T. R. 411; Gaskell *v.* King, 11 East, 165; Wiggs *v.* Shuttleworth, 13 *Id.* 87; Howe *v.* Synge, 15 *Id.* 440; Greenwood *v.* Bishop of London, 5 Taunt. 727. Application of the doctrine to cases affected by the statute of frauds: Rand *v.* Mather, 11 Cush. (Mass.) 1; 59 Am. Dec. 131; Page *v.* Monks, 5 Gray (Mass.), 492; Mayfield *v.* Wadsley, 3 Barn. & Cres. 357; Ex parte Littlejohn, 3 Mont. D. & De G. 182; Wood *v.* Benson, 2 Cromp. & J. 94; *s. c.* 2 Tyrwh. 93. In the following

§ 1049. Establishing a Quorum of the Board of Directors.— In New York, where the charter of a canal corporation with banking powers, provided that "the corporate powers of the company shall be exercised by a board of directors, to consist of twenty-three persons, who shall elect a president annually from their body, and possess the other privileges and powers conferred by law;" and among the other powers expressly enumerated, was the power "to adopt, establish and carry into execution such by-laws, etc., as shall by its president and directors, be judged necessary or convenient for the said corporation in respect to its canal and banking operations;" and the charter was silent on the question what number of directors should constitute a quorum for the transaction of business,— a by-law which enacted that "five directors, of whom the president shall always be one, or in his absence seven directors, shall form a quorum for the transaction of the ordinary business of the company," was held valid.[1]

§ 1050. Regulating Corporate Elections. — No reason is perceived why a corporation may not make reasonable by-laws regulating the conduct of corporate elections, where the mode of conducting such elections is not pointed out in the charter or in any other applicatory statute, and many statutes expressly confer the power to make such laws.[2] Accordingly, it has been held that a corporation empowered by charter "to make laws, etc., and to do all things needful for the good government and support of the congregation," may make a by-law giving the *president* thereof the power of *appointing inspectors* of the election of corporate officers.[3] It has also been held that a by-law that no tickets shall be counted, "if, besides the names,

cases, proceeding with reference to the statute of frauds, it was held that the different parts of the agreement could not be separated: Cook *v.* Toombs, 2 Anstr. 420; Mechelen *v.* Wallace, 7 Ad. & El. 49; Vaughn *v.* Hancock, 3 C. B. 766; Irvine *v.* Stone, 6 Cush. (Mass.) 508. This principle does not apply in the case of a contract founded upon an indivisible consideration, a part of which is illegal: in such a case the entire contract is void. Filson *v.* Heimes, 5 Pa. St. 452; *s.c.* 47 Am. Dec. 422; Bredin's Appeal, 92 Pa. St. 247; Shaw *v.* Spooner, 9 N. H. 197; *s. c.* 32 Am. Dec. 348; Woodruff *v.* Hinman, 11 Vt. 592; *s. c.* 34 Am. Dec. 712. Upon a similar principle, a conveyance in part to hinder, delay or defraud creditors, is void in toto. McNichol *v.* Richter, 13 Mo. App. 515; Cordes *v.* Straszer, 8 Mo. App. 61; St. Louis Coffin Co. *v.* Rubelman, 15 Mo. App. 280.

[1] Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267; Hoyt *v.* Thompson, 19 N. Y. 207; *ante*, § 3811.

[2] *Ante*, §§737, 740, 745.

[3] Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29; *s. c.* 8 Am. Dec. 628.

there are other things upon the tickets,'' is valid, the charter directing that all elections shall be by ballot. And under such a by-law, tickets on which an eagle was engraved were held not to be legally admissible;[1] and, though the question is subject to doubt and conflict in the absence of statutory directions,[2] it has been held that a corporation, whose object is to acquire property, may legally make a by-law authorizing the stockholders to vote by *proxy* at their meetings.[3]

§ **1051. Forbidding Secret Societies in Colleges.**— An incorporated college has authority to forbid its students from joining secret societies, although such societies are incorporated by the legislature.[4]

§ **1052. Instances of By-Laws which have been Held Valid.**— By-laws of corporations containing various provisions not deemed unreasonable or contrary to law and under various charters, governing statutes, circumstances and limitations which cannot be fully entered into in this paragraph,— have been upheld, regulating the manner of holding meetings and *electing* corporate officers;[5] requiring the officer or agent having charge of the corporate funds to give *bond* for the faithful performance of his duties;[6] by an incorporated *board of underwriters*, binding the members to uniformity in rates of insurance;[7] by an incorporated *board of trade*, providing for the payment of storage by the buyer of grain in bulk;[8] requiring the *clerk* of the corporation to be *sworn;*[9] of a *banking company*, requiring its cashier to give bond

[1] *Ibid.*

[2] *Ante*, § 722.

[3] State *v.* Tudor, 5 Day (Conn.), 329; *s. c.* 5 Am. Dec. 162.

[4] People *v.* Wheaton College, 40 Ill. 186.

[5] Re Long Island R. Co., 19 Wend. (N. Y.) 37; *s. c.* 32 Am. Dec. 429; Kearney *v.* Andrews, 10 N. J. Eq. 70; Taylor *v.* Griswold, 14 N. J. L. 222, 226; *s. c.* 27 Am. Dec. 33. Authorizing the members to vote at corporate elections by *proxy:* State *v.* Tudor, 5 Day (Conn.), 329; *s. c.* 5 Am. Dec. 162; People *v.* Crossley, 69 Ill. 195; *ante*, § 722. But see Taylor *v.* Griswold, 14 N. J. L. 222; Philips *v.* Wickham, 1 Paige (N. Y.), 590; People *v.* Twaddell, 18 Hun (N. Y.), 427,— which last cases hold that the right to vote by *proxy* must be authorized by the legislature.

[6] Savings Bank *v.* Hunt, 72 Mo. 597; *s. c.* 37 Am. Rep. 449.

[7] People *v.* Board of Fire Underwriters, 54 How. Pr. (N. Y.) 228, 240.

[8] Goddard *v.* Merchants' Exchange, 9 Mo. App. 290; *s. c.* affirmed, 78 Mo. 609.

[9] Hastings *v.* Blue Hill Turnp., 9 Pick. (Mass.) 80. But the corporation cannot avail themselves of his omission to take the oath in defense of an action against them; and if such

with security in the sum of $20,000; [1] of an *incorporated asylum*, requiring the inmates not to leave the premises without permission from the governor or one of his assistants, and prohibiting them from indulging in contentious, boisterous or disorderly conversation at the table, on pain of expulsion, has been held reasonable and valid; [2] of a benevolent association, providing, as a penalty for the non-payment of dues, that the delinquent should forfeit his rights to any benefits while in arrears, and for a period of three months after the payment of arrears; [3] of an incorporated city passenger railway company, prohibiting passengers from getting on and off the cars by the front platform; [4] and, generally, the regulations of carriers of passengers intended to protect the company from fraud and to promote the safety of the passengers, are upheld when reasonable.[5]

§ **1053. Conclusion of Title One.** — We have in this title considered the manner in which corporate charters and franchises are conferred by the legislature, and the constitutional restraints under which the legislatures act in making such grants. We have considered the usual modes of organizing corporations under special charters and under general laws. We have gone forward and examined the methods by which corporations are consolidated with each other, and by which they are reorganized after mortgage foreclosures or after the expiration of their charters. We have conducted the process of organizing a corporation down to the election of its officers and the establishment of its by-laws. In treating of these subjects, we have considered many incidental questions which seemed appropriate to be considered

by-law provide that the clerk shall be chosen yearly, and also that he shall continue in office till another shall be chosen and qualified, and the person first chosen and qualified is re-elected the next year, he continues to be clerk under the first election, till he is qualified under the second. *Ibid.* A by-law requiring the proceedings of each day to be drawn up by the secretary is satisfied where they are drawn up by a *secretary pro tem.*, acting in the absence of the regular secretary. Price *v.* Grand Rapids &c. R. Co., 18 Ind. 137.

[1] Savings Bank *v.* Hunt, 72 Mo. 597; *s. c.* 37 Am. Rep. 449.

[2] People *v.* Sailor's Snug Harbor, 54 Barb. (N. Y.) 532.

[3] Cartan *v.* Father Matthew &c. Soc., 3 Daly (N. Y.), 20.

[4] Baltimore &c. R. Co. *v.* Wilkinson, 30 Md. 224.

[5] Commonwealth *v.* Power, 7 Metc. (Mass.) 596; Walker *v.* Dry Dock &c. R. Co., 33 How. (N. Y.) Pr. 327 (that coupon tickets are not good unless torn off by the conductor).

in connection with the leading subjects under consideration. This discussion closes the first title, according to the plan on which this work has been projected. Although we have considered in this title the rights of members of corporations in many relations, yet we have scarcely touched upon those rights in respect of members of *joint-stock corporations.* That subject stands alone in the law of corporations — peculiar to itself; and it will be considered in the next three title.

TITLE TWO. CAPITAL STOCK AND SUBSCRIPTIONS THERETO.

CHAPTER XIX.

NATURE OF CAPITAL STOCK AND SHARES IN GENERAL.

§ 1059. Scope of this Chapter. — In commencing an extensive discussion of the subject of corporate stock and stockholders, it will be useful to give, in a preliminary chapter, an outline sketch of the nature of corporate stock and shares, and the relation of the holders of such shares to the corporation and to each other.

§ 1060. Definitions of "Capital Stock." — It has been said: "The word '*capital*' applied to corporations, is often used inter-

changeably with the words 'capital stock,' and both are frequently used to express the same thing — the property and assets of the corporation. Strictly, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by *shares*, issued to subscribers to the stock on the initiation of the corporate enterprise." [1] Another court has said: "It is a mistake to suppose that the stock of an individual consists of so much money owned by him, in the bank; the money in the bank is the property of the institution, and to the ownership of which the stockholder has no more claim than a person who is not at all connected with the bank. The stockholder has an entire and perfect ownership over his own stock, and may sell and transfer it to whomsoever he pleases, and from doing which the bank has no power to restrain him." [2]

§ 1061. Difference between Actual Stock and Potential Stock. — It has been pointed out in a well reasoned opinion by Mr. Justice McLean, that mere authorized or potential stock is improperly called *stock* or *capital stock*, until it is actually subscribed for by individuals. He said: "The corporate powers of the company were conferred for the express purpose of creating stock as a means of constructing the railroad. As well might the route for the road designated be called a railroad, as to call the corporate means of creating the stock, stock. In a legal point of view, it is important to call things by their right names. This is especially necessary when the effect of the exercise of corporate powers is to be determined. Stock can be created only by contract, whether it be in the simple form of a subscription, or in any other mode. There must be an agreement to take the stock, and nothing short of this can create it. This imparts to the stock the quality of property, which before it did not possess. It is called capital stock in the charter, because the corporate capacity to create it is given. The term stock, as used in the charter, before it is taken by

[1] Andrews, J., in Christensen *v.* Eno, 106 N. Y. 97, 100; *s. c.* 60 Am. Rep. 429, 431. See also Burrall *v.* Bushwick R. Co., 75 N. Y. 211, 212, and cases cited.

[2] Brightwell *v.* Mallory, MS. Cited 9 Yerg. (Tenn.) 501; Union Bank of Tennessee *v.* State, 9 Yerg. (Tenn.) 501.

subscription, means nothing more than a power in the directors to receive subscription for stock."[1] Whether the legislature in a particular statute means the one kind or the other, must, of course, depend upon the sense in which the words are used, as shown by the context and determined by other canons of interpretation. In a statute relating to the foreclosure of railway mortgages,[2] which authorizes a stockholder to acquire the same relative interest in the road, sold on foreclosure, as he had before, on paying a sum equal to such proportion of the price and costs as his stock bears to "the whole capital stock," — the words "the whole capital stock," mean the capital stock actually subscribed for and issued, and not the amount named in the articles of association.[3] So, in an act incorporating a railway company,[4] and providing in section 3, that the company "shall have the power and authority to borrow money in any sum or sums not exceeding in amount one-half of the par value of the capital stock," the par value of the capital stock is the amount of *paid up* capital only, and not the full amount of authorized capital.[5]

§ 1062. Distinction between Capital Stock and Tangible Property.— The term "capital stock," in an act of incorporation, is said to mean the amount contributed or advanced by the stockholders as members of the company, and does not refer to the tangible *property* of the corporation.[6] In a case in the Supreme Court of Missouri, where the subject was considered with reference to an *exemption from taxation*, this distinction seems to have been wholly lost sight of, and the conception completely reversed. There, the tangible property of a corporation is said to be its stock, within the meaning of the language of a charter which exempts the stock of a company which it creates from State and county taxes; and *lands* of such company, thereafter acquired by donation from the State, fall into the

[1] Sturges *v.* Stetson, 1 Biss. (U. S.) 246, 248; *s. c.* 10 Myer Fed. Dec., § 142.

[2] N. Y. Laws of 1853, ch. 502, § 2.

[3] Pratt *v.* Munson, 17 Hun (N. Y.), 475.

[4] Penn. Laws 1874, p. 458, incorporating the Lehigh Avenue R. Co.

[5] Appeal of Lehigh Ave. R. Co. (Pa.), 24 Week. Notes Cas. 530; 18 Atl. Repr. 498.

[6] State *v.* Morristown Fire Assoc., 23 N. J. L. 195. See also Barry *v.* Merchant's Exchange Co., 1 Sandf. Ch. (N. Y.) 280.

general volume of the company's stock and merely enhance its value. Such lands are therefore not taxable, under a general revenue law which provides for the taxation of "all property owned by incorporated companies over and above their capital stock." Such property is not deemed to be owned by the company over and above its capital stock.[1] It is obvious that this ruling entirely ignores the clause in the revenue law above quoted. It proceeds upon the general view that the legislature is not to be deemed to have intended to impose a *double taxation* upon the same property without having said so in express words; in other words, that it could not have intended to tax the property first through its representative credit, the certificates of stock, in the hands of the several shareholders, and to tax it again, *en masse*, as so much tangible property, in the hands of the artificial being, the corporation; but, notwithstanding these decisions, it is plain beyond question that this is precisely what the legislature did intend. No other possible meaning can be given to the language in the revenue law thus quoted. That language supposes that there may be corporate stock, and that there may be property other than corporate stock; and, however unjust the policy of double taxation may be, it scarcely admits of doubt that that is what the legislature intended. The court, however, were justified in saying that the clause was obscure; and one can quite agree with Holmes, J., in the following language: "It is pretty evident that the framer of that act did not have present in his mind any clear and definite ideas of the subject of which he was speaking. It is not easy to see how, in any legal sense, a corporation could own other property than that which would be represented by the stock in the hands of the shareholders. The shares of the stock might be above or below par value, according to the amount and value of the property owned by the corporation; and it is to be presumed that shares of stock would be taxed, if subject to taxation, in proportion to their value, like other kinds of property. In this way the whole property would be once taxed against the natural persons who are at last the only real owners of the property held by the corporation in which they are the stockholders. It would seem to be clear that, in con-

[1] State *v.* Hannibal &c. R. Co., 37 Mo. 265.

templation of law, there cannot be any other property of this corporation, over and above the stock held by the shareholders. This conclusion necessarily results from the very nature and constitution of the corporation. We are of opinion, therefore, that these lands were not taxable in the county of Livingston as such other property."[1] It is perceived that this decision amounts to this: that whereas a corporation can have no property over and above its capital stock, a clause of a revenue law providing for the taxing of property of corporations, "over and above their capital stock," is nonsense and hence inoperative. This seems equivalent to holding that a law is void because there is no sense in it,—a rule which might, with equal propriety, be applied to some judicial decisions.

§ 1063. What is Capital Stock, Viewed as a Trust Fund for Creditors.— We shall hereafter have occasion to examine the doctrine that the capital stock of a corporation is, in the theory of courts of equity, a trust fund for its creditors.[2] The capital stock of a corporation, which is subject to the operation of this rule, consists of all the stock for which the members have subscribed.[3] Treating this stock as money, it is capable of subdivision into three funds: 1. Money which has been subscribed as a part of the capital stock, and paid in. 2. Money thus subscribed, but not paid in.[4] 3. Money thus subscribed, and paid in, but afterwards divided among the members before all the debts of the corporation are paid.[5] The reason why the

[1] *Ibid.* 269.

[2] *Post*, § 2951, *et seq.*

[3] Adler *v.* Milwaukee Patent Brick Co., 13 Wis. 57; Hightower *v.* Thornton, 8 Ga. 486; *s. c.* 52 Am. Dec. 412; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387; Allen *v.* Montgomery R. Co., 11 Ala. 437; Slee *v.* Bloom, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273; Wood *v.* Dummer, 3 Mason, 308; Mann *v.* Pentz, 3 N. Y. 422; Payne *v.* Bullard, 23 Miss. 90.

[4] Slee *v.* Bloom, 19 Johns. (N. Y.) 456; *s. c.* 10 Am. Dec. 273; Briggs *v.* Penniman, 8 Cow. (N. Y.) 387; Ward *v.* Griswoldville Mfg. Co., 16 Conn. 597; Mann *v.* Pentz, 3 N. Y. 422; Allen *v.* Montgomery R. Co., 11 Ala. 437; Spear *v.* Grant, 16 Mass. 9; Hightower *v.* Thornton, 8 Ga. 486; *s. c.* 52 Am. Dec. 412; Bassett *v.* St. Albans Hotel Co., 47 Vt. 314; Henry *v.* Vermilion &c. R. Co., 17 Ohio, 187; Payne *v.* Bullard, 23 Miss. 90; Sanger *v.* Upton, 91 U. S. 60.

[5] Wood *v.* Dummer, 3 Mason (U. S.), 308; Curran *v.* Arkansas, 15 How. (U. S.) 304; Reid *v.* Eatonton Man. Co., 40 Ga. 98, 104; Lewis *v.* Robertson, 13 Smed. & M. (Miss.) 558.

capital stock of a corporation is deemed to embrace all the stock for which the members have subscribed, whether paid in or not, is that, since the members are not, in general, personally liable for the debts of the corporation, this fund is the stake held out to the public, upon the faith of which the company obtains credit.[1] Speaking with reference to this relation of the subject, it has been said: "The capital stock of a corporation is the fund which has accumulated in its coffers from the contributions of its members. It may be practically identified in the money, notes, bonds, securities or even land titles wherein the contributions have been invested. It includes all claims against shareholders for their unpaid subscriptions. All these elements, or their value, to the authorized extent, represent the capital stock or working capital of the corporation, in like manner as the goods upon the merchant's shelves represent his stock in trade. They constitute the trust fund — the *stock*. Regarded in this character, as first subject to the claims of creditors, the shareholder owns not a dollar of it. He owns no stock. What he owns is simply a right or share in the proceeds or profits of the stock proportioned to the amount of his contribution, together with an ultimate right to receive back his contribution, or so much as may remain thereof, upon the dissolution or closing up of the corporation."[2]

§ 1064. When Capital Includes Profits and Surplus.— The profits and surplus fund of a bank, whenever they may have accrued, are, until separated from the capital by the declaration of a dividend, a part of the stock itself, and will pass with the stock under that name in a transfer or bequest.[3]

§ 1065. Shares Sometimes Inappropriately Called "Stock." — Correctly speaking, the aliquot parts of the capital stock of a corporation qualified as hereafter stated, are termed *shares;*

[1] See the reasoning of Dixon, C. J., in Adler *v.* Milwaukee Patent Brick Co., 13 Wis. 60; see also Hightower *v.* Thornton, 8 Ga. 495; *s. c.* 52 Am. Dec. 412; Allen *v.* Montgomery R. Co., 11 Ala. 437; Ward *v.* Griswoldville Mfg. Co., 16 Conn. 599; *post,* § 2951 *et seq.*

[2] Bent *v.* Hart, 10 Mo. App. 143, 146, opinion by Lewis, P. J.

[3] Phelps *v.* Farmers' &c. Bank, 26 Conn. 269; *post,* § 2174

and this is the expression used in the English books. American judges and writers, however, loosely designate the interest of each shareholder in the capital of the company as his *stock;* and one court has thought this designation not inappropriate.[1]

§ **1066. Shares are Personal Property.**— Contrary to early opinion,[2] it is now generally agreed that shares of stock in corporations are personal property, whether they are declared to be such by statute or not, and whether the property of the corporation itself is real or personal.[3] The reason is that shares in an in-

[1] People *v.* Commissioners of Taxes, 23 N. Y. 192, 220.

[2] Drybutter *v.* Bartholomew, 2 P. Wms. 127; Townsend *v.* Ash, 3 Atk. 336; Buckeridge *v.* Ingram, 2 Ves. Jr. 652; Welles *v.* Cowles, 2 Conn. 567; Welles *v.* Cowles, 2d case, 4 Conn. 182; Rex *v.* Chipping Norton, 5 East, 239; Habergham *v.* Vincent, 2 Ves. Jr. 232; Hurst *v.* Meason's Estate, 4 Watts (Pa.), 346; Price *v.* Price, 6 Dana (Ky.), 107; Copeland *v.* Copeland, 7 Bush (Ky.), 349. In some of these cases it does not appear that the companies by which the shares were issued were any more than *joint-stock partnerships*, in which case, according to the early English theory, the members would be *partners*, and each member would therefore have a direct proprietary interest in the land of the company; and all these rulings were made with reference to *companies owning lands.* Others related to companies which owned lands and had the franchise of receiving tolls, such as navigation companies, turnpike companies and the like, and the reasoning was that the right to tolls was a right issuing out of land, and hence an incorporeal hereditament and therefore realty. The doctrine thus came to be extended insensibly, as in the Kentucky and Connecticut cases just cited, to shares in incorporated companies — owning lands — such as a turnpike company, as in Welles *v.* Cowles, *supra*, or a railroad company, as in Price *v.* Price, *supra.* In his edition of Cruise, Prof. Greenleaf supposed that shares in a corporation might be real or personal property accordingly as the property of the corporation was real or personal property. But all these authorities overlook an obvious distinction, which later decisions have recognized, which will be hereafter stated. In Kentucky and Connecticut the rule laid down in the cases already cited is said to have been subsequently repealed by statute.

[3] Russell *v.* Temple, 3 Dane Abr. 108; Bligh *v.* Brent, 2 Younge & C. (Exch.) 268, 294; Bradley *v.* Holdsworth, 3 Mees. & W. 422; Tregear *v.* Etiwanda Water Co., 76 Cal. 537; *s. c.* 9 Am. St. Rep. 245; Seward *v.* Rising Sun, 79 Ind. 351. Duncuft *v.* Albrecht, 12 Sim. 189; Johns *v.* Johns, 1 Oh. St. 350; Southwestern R. Co. *v.* Thomason, 40 Ga., 408; Arnold *v.* Ruggles, 1 R. I. 165; Tippets *v.* Walker, 4 Mass. 595, 596, per Parsons, C. J.; Allen *v.* Pegram, 16 Ia. 163, 173; Edwards *v.* Hall, 6 De Gex M. & G. 74, 91; following Myers *v.* Perigal, 2 De Gex M. & G. 599, where the same was held in respect of shares of an unincorporated joint-stock company, and overruling Ware *v.* Cumberlege, 20 Beav. 503; *s. c.* 24 L. J. Chan. 630; 1 Jur. (N. S.) 745.

corporated company do not give to their owner any right in the property itself of the company. That remains in the artificial body called the corporation. It merely gives him a right to his share of the profits of the corporation while it is a going concern, and to a share of the proceeds of its assets when sold for distribution in case of its dissolution and winding up. The shareholders are neither joint tenants, tenants-in-common, nor coparceners, in respect of the corporate property. Their shares are merely choses in action — a right to profits and dividends.[1]

§ 1067. So are Shares in Unincorporated Joint-Stock Companies.—It is now settled in England that shares in joint-stock companies, whether incorporated or unincorporated, are, like shares in a partnership, personal property. Thus, it has been held that shares in railroad companies,[2] canal companies,[3] cost-book mining companies,[4] foreign mining companies,[5] insurance companies,[6] are not interests in land within the *mortmain acts.* So, it has been held that shares in water-works companies,[7] cost-book mining companies,[8] banking companies,[9] and railway companies,[10] are not interests in land within the meaning of the fourth section of the *statute of frauds.*

§ 1068. Not Goods, Wares and Merchandise. — Neither are shares of joint-stock companies goods, wares, or merchandise within the seventeenth section of the English *statute of frauds.*[11] It has been so held in respect of banking companies,[12] railway com-

[1] As hereafter seen, shares of corporate stock are subject to *execution* and *attachment* (*post,* § 2765), as personal property.

[2] Linley *v.* Taylor, 1 Giff. 67; *s. c.* 2 De Gex F. & J. 84.

[3] Edwards *v.* Hall, 6 De Gex M. & G. 74.

[4] Hayter *v.* Tucker, 4 Kay & J. 243.

[5] Baker *v.* Sutton, 1 Keen, 234.

[6] March *v.* Atty.-Gen., 5 Beav. 433.

[7] Bligh *v.* Brent, 2 Younge & C. Exch. 268; Weekley *v.* Weekley, *Id.* 281, note.

[8] Powell *v.* Jessopp, 18 C. B. 336; Walker *v.* Bartlett, *Id.* 8, 45; Watson *v.* Spratley, 10 Exch. 222; *contra* and *overruled,* Vice *v.* Anson, 7 Barn. & Cres. 409; Boyce *v.* Greene, Batty, 608.

[9] Humble *v.* Mitchell, 11 Ad. & El. 205.

[10] Duncuft *v.* Albrecht, 12 Sim. 189; Bradley *v.* Holdsworth, 3 Mees. & W. 422.

[11] Watson *v.* Spratley, 10 Exch. 222. See Colt *v.* Nettervill, 2 P. Wms. 304.

[12] Humble *v.* Mitchell, 11 Ad. & El. 205.

panies,[1] and cost-book mining companies.[2] Nor are such shares within the exception in the English *stamp acts*, exempting agreements relating to the sale of goods, wares and merchandise from stamp duty.[3] One modern American case is met with, which holds, but without citing any authority, that shares of corporate stock are goods, wares and merchandise, within the meaning of the statute of frauds, so as to require a note or memorandum in writing to validate a *sale* thereof.[4] The court accordingly held that a verbal contract by which A. purchases of B. a one-fourth interest in an existing corporation is void.[5] This decision does not of course impugn the well-known rule that shares of corporate stock may be *transferred* by the delivery of the stock certificate, which is the symbolical representative of the shareholder's interest, accompanied with a power of attorney in blank, authorizing the attorney in fact whose name shall be inserted therein to make the proper transfer upon the books of the company.

§ **1069. Not "Moneys."** — Shares or stock are not "moneys" within the meaning of a clause in a *will* creating a specific bequest.[6]

§ **1070. Are Choses in Action.** —Judicial opinion has characterized corporate shares as choses in action.[7] This will appear to be a sound conception when it is reflected that corporate shares are merely *contract rights*, namely, the right to participate in the election of the corporate officers, to be eligible to the office of director therein, to receive dividends of its profits, and, after its debts have been satisfied, to receive a proportional share of its assets on its being wound up.[8]

[1] Tempest *v.* Kilner, 2 C. B. 300; Bowlby *v.* Bell, 3 *Id.* 284; Duncuft *v.* Albrecht, 12 Sim. 189.

[2] Watson *v.* Spratley, 10 Exch. 222.

[3] Knight *v.* Barber, 1 6 Mees. & W. 66.

[4] Fine *v.* Hornsby, 2 Mo. App. 61; Bernhardt *v.* Walls, 29 Mo. App. 206.

[5] Fine *v.* Hornsby, *supra.*

[6] Collins *v.* Collins, L. R. 12 Eq. 455.

[7] Stanwood *v.* Stanwood, 17 Mass. 57; Denton *v.* Livingston, 9 Johns. (N. Y.) 96; Planters &c. Bank *v.* Leavens, 4 Ala. 753; Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373; Arnold *v.* Ruggles, 1 R. I. 165.

[8] "Shares," says a recent writer of reputation, "are not in fact chattels, while the certificates are; the shares are merely contract rights." 1 Mor.

§ **1071. Shareholders not Co-Owners.** — Shareholders are not joint tenants, or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation.[1] A share of the capital stock merely gives the right to partake, according to the amount put into the fund, of the surplus profits of the corporation, and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired and is not liable for debts of the corporation. A subscriber to such capital stock does not become the owner of a given number of the shares, in such a sense as takes the shares out of the corporate fund; the fund becomes the property of the aggregate body only. It can only issue a certificate as evidence of the existence of the share and ownership.[2] From this principle several important consequences follow, which will be separately noted.

§ **1072. Execution against Interest in Corporate Property.** — His interest in the corporate property cannot therefore be seized and sold under judicial process, as can the interest of a partner or tenant-in-common;[3] though, as hereafter pointed out, his shares, considered in themselves as chattels, can be taken and sold under execution or attachment.[4]

§ **1073. Shareholders cannot Convey Corporate Property though All Join in the Deed.**— As the shareholders are in no direct sense proprietors of the corporate property they cannot convey the real estate of the corporation though all join in the deed,[5] though effect may be given to such a conveyance in equity.[6]

Priv. Corp., § 200. See also the observations of the same writer at §§ 193 and 225.

[1] Mickles *v.* Rochester City Bank, 11 Paige (N. Y.), 118; *s. c.* 42 Am. Dec. 103; Spurlock *v.* Missouri Pacific R. Co., 90 Mo. 200, 207; Williamson *v.* Smoot, 7 Mart. (La.) 31.

[2] Burrall *v.* Bushwick R. Co., 75 N. Y. 211.

[3] Williamson *v.* Smoot, 7 Mart. (La.) 31.

[4] *Post*, § 2765.

[5] Wheelock *v.* Moulton, 15 Vt. 519. The same has been held in England in respect of the shares of an unincorporated joint-stock company. Myers *v.* Perigal, 2 De Gex M. & G. 599 (approved in Edwards *v.* Hall, 6 De Gex M. & G. 74, 92).

[6] *Ante*, § 18.

§ 1074. Incorporating a Partnership: Mode of Succeeding to the Partnership Assets.— From what has preceded it will be understood that the mere fact of incorporating a partnership although under the same name, does not invest the corporation with the property of the firm; but there must be a conveyance by the partners to the new artificial entity.[1]

§ 1075. Cannot Act for the Corporation, or Bind it by Admissions, etc.— A shareholder cannot bind his corporation by his acts or admissions, in the mere character of shareholder,[2] — though he can if an officer, and if the acts or admissions are within the scope of his agency.[3] He cannot, therefore, release a debt due to the corporation.[4]

§ 1076. Not in a Trust Relation towards the Corporation.— The relation of trustee and *cestui que trust*, or of debtor and creditor, or of partnership, does not exist between the stockholders of an incorporated company and the corporation itself.[5] But the corporation and the individual shareholder may deal with each other at arm's length the same as two strangers may, and a shareholder may contract with his corporation, and sue or be sued on his contracts.[6] A shareholder may become a creditor of the corporation by entering into a contract with it;[7] and, on the other hand, the corporation is regarded as a trustee for the shareholder for the limited purpose of registering a transfer of his shares on the corporate books.[8] But, as hereafter seen,[9] the *directors* and other managing *officers* stand in a fiduciary relation not only to the corporation, but also to the shareholders.

§ 1077. Cannot Sue the Directors at Law. — The entire body of shareholders are therefore not, in the intendment of the

[1] Carothers *v.* Alexander, 74 Tex. 309; *s. c.* 12 S. W. Rep. 4.

[2] Shay *v.* Tuolumne Water Co., 6 Cal. 73.

[3] *Post*, § 3740.

[4] Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267. Compare Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836; 56 N. Y. Super. Ct. (24 Jones & S.) 236.

[5] Verplanck *v.* Mercantile Ins. Co., 1 Edw. (N. Y.) 84.

[6] Culbertson *v.* Wabash Nav. Co., 4 McLean (U. S.), 544.

[7] Borland *v.* Haven, 37 Fed. Rep. 394.

[8] *Post*, § 2486.

[9] *Post*, § 4009, *et seq.*

law, the corporation, though they are often regarded as such in the eye of courts of equity, which look through the forms to the substance of things. From this it follows that the directors of the corporation are not the *agents* of the aggregate body of stockholders, in the theory of courts of the common law, though they are *trustees* for them in the theory of courts of equity. Not being such agents, a stockholder cannot maintain an action against them for their negligence or malfeasance in the conduct of the affairs of the corporation whereby its assets have been wasted and his shares have been rendered worthless.[1]

§ 1078. **Not Responsible for Its Torts.** — The shareholder is neither responsible for the debts,[2] nor for the torts of the corporation.[3] Nor is the agent of the corporation his agent, and he will not therefore be bound by the fraudulent representations of the latter.[4]

§ 1079. **Not in Privity with Each Other.** — Nor are stockholders in privity with each other; nor do they, in the absence of special engagements, occupy any trust relation towards each other; but they may deal with each other at arm's length just as they may so deal with the corporation.[5] Therefore, the unauthorized acts of one shareholder will not, in the absence of special circumstances, be imputed to the others, or bind them in any manner to their detriment.[4]

§ 1080. **Not Necessary Parties to Suits in Respect of Corporate Rights.** — In the absence of special circumstances here-

[1] Smith *v.* Hurd, 12 Metc. (Mass.) 371; *post,* § 4090

[2] *Post,* § 2925

[3] Thus, a complaint under a *mill act* (Mass. Pub. Stat. 1882, ch. 190), for *flowage,* etc., against the individuals of a corporation, cannot be sustained where the charter subjects them to no personal liability. Norton *v.* Hodges, 100 Mass. 241. So, a stockholder of a railroad company is not liable for the *negligence* of the officers, agents, or employes of the company in the operation of its road. Atchison &c. R. Co. *v.* Cochran, 43 Kan. 225; *s. c.* 23 Pac. Rep. 151.

[4] The fraudulent representations of an agent of the corporation concerning the value of the stock will not vitiate a sale of stock by a stockholder, who has no notice of the fraud. Moffat *v.* Winslow, 7 Paige (N. Y.), 124.

[5] Gillett *v.* Bowen, 23 Fed. Rep. 625.

[6] Western Mining &c. Co. *v.* Peytona Canal Coal Co., 8 W. Va. 406.

after considered,[1] shareholders cannot be parties, either plaintiff or defendant, in actions respecting corporate rights. That is to say, in those actions where the corporation itself must regularly prosecute or defend. They cannot sue individually for the *conversion* of corporate property.[2] Nor can a shareholder have an injunction to restrain a slander of the title of the cor poration to its property.[3] Nor, in the absence of statutes, can they be defendants in actions at law against the corporation.[4] It has been held in one jurisdiction that a shareholder cannot sue in the corporate name to recover his individual rights, without the assent of a majority of the corporation, nor carry on such a suit by *certiorari*.[5]

§ 1081. Not Affected with Notice, etc.— A stockholder is not, simply as such, bound to know the rules and regulations which the directors may prescribe for the transaction of the business of the corporation, with the public generally, merely because they appear recorded on the minute books of the corporation.[6] Nor is notice to an officer of the corporation notice to a shareholder in such a sense as to affect his rights.[7] But it has been held that subscribers for stock in a corporation must be presumed to know the provisions of its charter.[8]

§ 1082. To What Extent in Privity with the Corporation.— But for certain purposes, he is in privity with the corporation,

[1] *Post*, Ch. 89.

[2] Tomlinson *v.* Bricklayer's Union, 87 Ind. 308; Langdon *v.* Hillside Coal &c. Co., 41 Fed. Rep. 609.

[3] *Post*, Ch. 89.

[4] *Post*, Ch. 89. A stockholder in a corporation is no party in a suit against it, although his individual property is attached in the suit, and a copy of the writ is left with him; and he may impeach the judgment recovered therein, when introduced against him. Whitman *v.* Cox, 26 Me. 335.

[5] Silk Mfg. Co. *v.* Campbell, 27 N. J. L. 539.

[6] Pearsall *v.* Western Un. Tel. Co., 44 Hun (N. Y.), 532; *s. c.* 9 N. Y. St. Rep. 132.

[7] Thus, it has been held that where several persons, acting together as a society under the name of a certain "grange," subscribe for stock in a corporation, a notice by a creditor of an insolvent corporation, for the purpose of charging the members of the grange as stockholders, given to the master or presiding officer of the grange, is not notice under Kan. Gen. Stat. 1889, § 1192, to the members of the grange. Wells *v.* Robb, 43 Kan. 201; *s. c.* 23 Pac. Rep. 148.

[8] Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4.

as much as though it were a partnership, and he were a member of it. Thus, as respects his liability to answer ultimately for the debts of the corporation, a *judgment against the corporation*, in the view taken by several of the courts, concludes him as much as though he were a party to the record; [1] though the rule seems to be otherwise in New York.[2] It has been held that the immunity which attends the acts of *de facto officers*, does not apply to the acts of a pretended board of directors of a corporation which has never been organized in accordance with the law of its creation, as respects stockholders of the pretended corporation who participate actively in its proceedings.[3]

§ 1083. No Distinction in these Respects between Incorporated and Unincorporated Companies. — There is no distinction in substance between the rights of a shareholder in an incorporated and an unincorporated joint-stock company, so far as the nature of his interest in the property is concerned. "It would be unfortunate," said Mr. Baron Martin, "if it were found to be so. It would, as already observed, of necessity introduce a new course of dealing from what has hitherto been in use in regard to this species of property, which would be inconvenient; and it would make a distinction between shares in one species of joint-stock companies and another, which persons not acquainted with the law would not readily appreciate or understand. I think, however,

[1] Merrill *v.* Suffolk Bank, 31 Me. 57; Came *v.* Brigham, 39 Me. 35; Milliken *v.* Whitehouse, 49 Me. 529; Slee *v.* Bloom, 20 Johns. (N. Y.) 669; *s. c.* 10 Am. Dec. 273; Moss *v.* Oakley, 2 Hill (N. Y.), 265; Belmont *v.* Coleman, 1 Bosw. (N. Y.) 188; Donworth *v.* Coolbaugh, 5 Iowa, 300; Wilson *v.* Pittsburgh &c. Coal Co., 43 Pa. St. 424; Grund *v.* Tucker, 5 Kan. 70. *Contra*, Moss *v.* McCullough, 5 Hill (N. Y.), 131; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Miller *v.* White, 50 N. Y. 137; McMahon *v.* Macy, 51 N. Y. 155. See Moss *v.* Averell, 10 N. Y. 449; Belmont *v.* Coleman, 21 N. Y. 96; *s. c.* 1 Bosw. (N. Y.) 188; Hampson *v.* Weare, 4 Iowa, 13. The Kansas court, in Grund *v.* Tucker, 5 Kan. 70, hold that the judgment against the corporation is *prima facie* evidence against the stockholder. It was not necessary to go beyond this, for there was no rebutting evidence offered. But in its reasoning the court follows that in Slee *v.* Bloom, 20 Johns. (N. Y.) 669, which is to the effect that such a judgment is conclusive. Hawes *v.* Anglo-Saxon Co., 101 Mass. 385, 397; Milliken *v.* Whitehouse, 49 Me. 527; Donworth *v.* Coolbaugh, 5 Iowa, 300. See *post*, § 3392, *et seq.*

[2] McMahon *v.* Macy, 51 N. Y. 155.

[3] Miller *v.* Ewer, 27 Me. 509, 524.

there is no such difference. In substance and reality, the interest of the shareholder in a mining unincorporated company, and in an incorporated joint-stock company, is exactly the same. In both it is an interest in the ultimate profits. In neither can the shareholder directly intermeddle or deal with the land; and although apparently in a mining company the interest of a shareholder in land seems to be greater than in ordinary trading joint-stock companies, nevertheless almost all trading companies have houses or land, and without them their business could not in general be carried on, as was observed by the vice-chancellor in Hilton *v.* Giraud.[1] The share in a mining company consists of an interest in the machinery, the capital, the skill and labor employed upon the mine, as well as in the mine itself. The employment of land, may be, or may be supposed to be, greater in degree in mining companies, but the nature of the property in the share is the same as in the shares of other trading partnerships into the capital of which land or the use of it does not so largely enter." [2]

§ 1084. A Comparison between Shares in a Partnership and Shares in a "Company." — Sir Nathaniel Lindley, in his work on Partnership,[3] points out a close resemblance between shares in a simple partnership and shares in what in England is called a company, which is understood to mean a joint-stock company, which may be either incorporated or unincorporated. He says: "What is meant by the share of a partner is his proportion of the partnership assets after they have all been realized upon and converted into money, and all the debts and liabilities have been paid and discharged.[4] This it is, and this only, which, on the

[1] 1 De Gex & S. 187.

[2] Watson *v.* Spratley, 10 Exch. 222, 238; *ante*, § 1067.

[3] 2 Lind. Part. (4th ed.) 661, 662.

[4] In support of this proposition he cites the following cases, all of which support his text: Doddington *v.* Hallet, 1 Ves. Sr. 497; Croft *v.* Pyke, 3 P. Wms. 180; West *v.* Skip, 1 Ves. Sr. 239; Taylor *v.* Fields, 4 Ves. 396; Crawshay *v.* Collins, 15 Ves. 218, 229; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Darby *v.* Darby, 3 Drew. 495, 503. To which the learned American editor, Dr. Ewell, has added the following citations of American cases which seem equally applicable: Smith *v.* Evans, 37 Ind. 526; Carter *v.* Bradley, 58 Ill. 101; Hill *v.* Beach, 12 N. J. Eq. 31; Douglas *v.* Winslow, 20 Me. 89; Perry *v.* Holloway, 6 La. Ann. 265; Simpson *v.* Leech, 86 Ill. 286;

death of a partner, passes to his representatives or to a legatee of his share;[1] which under the old law was considered as *bona notabilia;*[2] which on his bankruptcy passes to his trustee;[3] and which the sheriff can dispose of under a *fi. fa.* issued at the suit of a separate creditor,[4] or under an extent at the suit of the crown.[5] * * * Speaking generally, a share in a company signifies a definite portion of its capital. When a company is formed, a sum of money is fixed upon and is called its capital; this sum is divided into a number of equal portions; each of these portions is a share, and whether the sum fixed upon is ever all subscribed or not, and whether what is subscribed is employed profitably or the contrary, a share retains its original meaning. A share in a company, like a share in a partnership, is in truth a

Filley *v.* Phelps, 18 Conn. 294; Staats *v.* Bristow, 73 N. Y. 264; Schalck *v.* Harmon, 6 Minn. 265, 269; Re Corbett, 5 Sawyer (U. S.), 206; Hall *v.* Clagett, 48 Md. 223; Conkling *v.* Washington University, 2 Md. Chan. 497; Menagh *v.* Whitwell, 52 N. Y. 146; Mayer *v.* Garber, 53 Iowa, 689; *s. c.* 6 N. W. Rep. 63. See also Taft *v.* Schwamb, 80 Ill. 289; Chase *v.* Scott, 33 Iowa, 309.

[1] Citing Farquhar *v.* Hadden, L. R. 7 Chan. 1.

[2] Citing Ekins *v.* Brown, 1 Eccl. & Adm. Rep. (Spink) 400; Atty.-Gen. *v.* Higgins, 2 Hurl. & N. 339.

[3] Citing Smith *v.* Stokes, 1 East, 363.

[4] Skipp *v.* Harwood, 2 Swanst. 586; Re Wait, 1 Jac. & W. 585; Johnson *v.* Evans, 7 Man. & G. 240; Menagh *v.* Whitwell, 52 N. Y. 146; Holmes *v.* Mentze, 4 Ad. & El. 127; *s. c.* 5 Nev. & M. 563; 4 Dowl. 300; Sitler *v.* Walker, 1 Freem. Ch. (Miss.) 77; Place *v.* Sweetzer, 16 Oh. 142; James *v.* Stratton, 32 Ill. 202; Newhall *v.* Buckingham, 14 Ill. 405; White *v.* Jones, 38 Ill. 159; Dow *v.* Sayword, 14 N. H. 9; *s. c.* 12 N. H. 271; Marston *v.* Dewberry, 21 La. An. 518; Nixon *v.* Nash, 12 Oh. St. 647; Choppin *v.* Wilson, 27 La. An. 444; Saunders *v.* Bartlett, 12 Heisk. (Tenn.) 316; Wilson *v.* Strobach, 59 Ala. 488; Weaver *v.* Ashcroft, 50 Tex. 428; People's Bank *v.* Shryock, 48 Md. 427; Morgan *v.* Watmough, 5 Whart. (Pa.) 125; Wiles *v.* Maddox, 26 Mo. 77; Thomas *v.* Lusk, 13 La. An. 277; Nelson *v.* Conner, 3 La. An. 456; Lee *v.* Bullard, *Id.* 462; Phillips *v.* Cook, 24 Wend. (N. Y.) 389; U. S. *v.* Williams, 4 McLean (U. S.), 236; Williams *v.* Gage, 49 Miss. 777; Brewster *v.* Hammet, 4 Conn. 540; Gibson *v.* Stevens, 7 N. H. 352; Filley *v.* Phelps, 18 Conn. 294; Witter *v.* Richards, 10 Conn. 37; Jones *v.* Thompson, 12 Cal. 191; Fisk *v.* Herrick, 6 Mass. 271; Pierce *v.* Jackson, 6 Mass. 242; Tappan *v.* Blaisdell, 5 N. H. 190; Knox *v.* Summers, 4 Yeates (Pa.), 477; McCarty *v.* Emlen, 2 Yeates (Pa.), 190; Knox *v.* Schepler, 2 Hill (S. C.), 595; White *v.* Dougherty, Mart. & Y. (Tenn.) 309; Lyndon *v.* Gorham, 1 Gall. (U. S.) 367; Merrill *v.* Rinker, 1 Bald. (U. S.) 528.

[5] Citing Rex *v.* Sanderson, Wightw. 50; Rex *v.* Rock, 2 Price, 198; Rex *v.* Hodge, 12 Price, 537; Spears *v.* Atty.-Gen., 6 Clark & F. 180.

definite proportion of a joint estate after it has been turned into money and applied as far as may be necessary in payment of the joint debts."[1]

§ **1085. Capital Stock a Liability of the Corporation.** — The capital stock of a corporation is not a debt due by the shareholders to the corporation; on the contrary, the shares of such stock represent a liability of the corporation to the shareholders. It follows that if the shareholder, at a time when the corporation is insolvent sell his shares for value to another person or corporation, and the transfer is properly executed, neither the former corporation nor its receiver, or other representative of it or its creditors, can maintain a suit against the shareholder for the money which he has so received for his shares. An apology would be due for discussing a question so absurd, if it had not been contested in an important case by able counsel. The case was, that a life insurance company, which we will call A, being in difficulties and insolvent, transferred its assets and its risks to another company which we will call B, upon a contract, the consideration of which was twofold: 1. That Company B should reinsure the risks of Company A. 2. That Company B should issue its paid-up shares of stock, dollar for dollar, to all the shareholders of Company A who should apply for the same within twenty days, and that it should also redeem its stock so issued by paying to the holders of it its par value, if demanded by them within twelve months. At the time when this contract was made and executed as between the two companies, Company B was also insolvent, though it was at the time a going concern. One of the shareholders of Company A owned shares of such company of the par value of $5500. For this he received, under the terms of the contract, paid-up shares of Company B of like value, and afterward, upon his request, Company B redeemed the same by paying him $5500 therefor. Subsequently a receiver in charge of the

[1] Citing Watson *v.* Spratley, 10 Exch. 222; Sparling *v.* Parker, 9 Beav. 450. The question of the nature of the ownership of shareholders in unincorporated joint-stock companies came before the Court of Session of Scotland in 1868, the precise question being whether such ownership was capable of conferring the elective franchise. The case is valuable for the observations of two of the judges upon the nature of such ownership. Dove *v.* Young, 7 Macpherson, 304, 306. See also *ante*, §§ 3, 4, 5, 6, 1067.

affairs of Company A brought an action against this shareholder to recover the money which he had thus received from Company B, alleging that this exchange and redemption of stock was merely a contrivance whereby the shareholders of Company A appropriated to their own use and in redemption of the capital stock of Company A, a portion of the assets of such company, in fraud of its creditors, and that the payments made by Company B in redeeming the shares of stock which, in pursuance of the contract, it had issued to the shareholders of Company A, were made out of the funds received by it from Company A. The validity of the transfer of assets had been conclusively established in another proceeding, and was not controverted. It was held that the receiver could not recover, and this upon several obvious grounds. The contract between the two companies could not be avoided in part; it must stand or fall as an entirety. As its validity was not drawn in question, it followed that there was no privity between the plaintiff and the defendant, since the latter had ceased to be a shareholder of the corporation of which the plaintiff was receiver. The receiver, as the representative of Company A, had no right to recover on the theory that the money thus paid to the defendant by Company B was a part of the assets of Company A; since, by the terms of a valid contract, Company A had sold and tranferred all its assets, these included, to Company B. If, therefore, the defendant was liable to any one to restore the money he had thus received, he was liable, not to the receiver of Company A, but to the receiver of Company B.[1]

[1] Bent *v.* Hart, 73 Mo. 641; affirming *s. c.* 10 Mo. App. 143. Sherwood, C. J., dissented.

CHAPTER XX.

WHO MAY BECOME SHAREHOLDERS IN CORPORATIONS.

ARTICLE I. NATURAL PERSONS.

§ **1090. Persons Capable of Contracting.** — A subscription to the stock of a corporation being a contract, the general rule is that no one can become a subscriber who is incapable of contracting.[1] The legislature may, and in some cases American legislatures have, in granting special charters changed this rule as to particular corporations, by enacting that married women, for example, may become subscribers to their capital stock, establishing a special enabling act for the benefit of the particular company.[2] Where there is no such exception to the general rule, a subscription, valid and effective for all purposes, can be made by a person under disability, only through the intervention of a trustee who is not under a disability; and then the trustee becomes in legal effect the shareholder, and answerable personally as such, subject of course to the obligations of his trust as between himself and the beneficiary therein.[3] It should be

[1] Lind. Comp. L. 5th ed., p. 36.

[2] *Post,* § 1096.

[3] *Post,* § 3194.

borne in mind that the incapacity of persons under disability to *subscribe* for shares does not amount to a disability to *own* shares, where the title to shares is devolved upon them in any mode permitted by law.[1]

§ **1091. By what Law the Subject Governed.** — The question whether a person in any given case is competent to become a subscriber to the shares of a corporation, is governed by the general law of the State or country creating the corporation; and if the charter or governing statute of the corporation contains a special enabling act, such as that spoken of in the last section, that of course governs. So that, it may be affirmed with confidence that the question is governed exclusively by the law of the domicil of the corporation.

§ **1092. Alien Friends.**—No principle of the common law exists which prevents an alien friend from becoming a shareholder in a corporation; and as hereafter seen,[2] such shareholder has the same right to vote at a corporate election as a citizen shareholder.[3]

§ **1093. Ambassadors of Foreign Countries.** — An ambassador of a foreign country undoubtedly has the same capacity to become a shareholder that is possessed by any other alien friend; though while accredited and received as such ambassador, he is privileged from all civil actions, and he consequently cannot be sued for assessments.[4]

§ **1094. Alien Enemies.**— Alien enemies, domiciled in their own country, cannot become shareholders in a domestic corpora-

[1] *Post*, §§ 1095, 2307, 3271, 3272.

[2] *Post*, § 3046.

[3] It has been held that a ship may have an English register, though some of the members of the company which owns it are aliens (Reg. *v.* Arnaud, 9 Ad. & El. (N. S.) 806); and it is well known that the steamships City of New York and City of Paris originally had British registers and sailed under the British navigation laws and the British flag, and were yet owned by an American corporation; and so the steamship China, belonging to the Pacific Mail Steamship Company (shame to our navigation laws!) sails under the British flag.

[4] Magdalena Steam Nav. Co. *v.* Martin, 2 El. & El. 94.

tion, while the war lasts; because, on a principle of public law, no contract can take place between them and citizens of the domestic country, since such a contract involves the making of communications across lines of belligerent occupancy, which is contrary to the policy of war and hence unlawful. Such being the reason of the rule, it extends not only to all citizens of the enemy country residing therein, but also to all other persons therein resident: all the people of the opposing states are regarded as enemies without regard to their citizenship or disposition.[1] Executory contracts which are of such a nature that they cannot be carried on without intercourse across the belligerent lines, are dissolved by the fact of war, and this principle works dissolutions of partnerships, since partners are agents for the firm and for each other.[2] But as a shareholder is not in privity with the corporation within the principles of the common law — is a distinct person from it and from the other shareholders, with whom he may deal even in respect of corporate rights as with strangers,[3] — it would seem to follow that a declaration of war will not have the effect of severing the relation of a shareholder, where the corporation is domiciled within one of the belligerent countries and the shareholder in the other; though it will suspend any legal remedies which either may have against the other.[4]

§ 1095. **Infants.** — An infant may become a shareholder, either by an original subscription or by a purchase, but subject to his right to repudiate the relation either during his infancy or within a reasonable time after coming of age;[5] but so long as he elects to hold on to the shares, he must pay calls like other shareholders: he cannot keep the benefit and repudiate the burden.[6]

[1] The Peterhoff, 5 Wall. (U. S.) 28; Jecker *v.* Montgomery, 18 How. (U. S.) 110; Lamar *v.* Browne, 92 U. S. 187; The Flying Scud, 6 Wall. (U. S.) 263; Mrs. Alexander's Cotton, 2 Wall. (U. S.) 404; Albrecht *v.* Sussman, Ves. & B. 323; Willison *v.* Patteson, 7 Taunt. 440: Ex parte Boussmaker, 13 Ves. 71; Potts *v.* Bell, 8 T. R. 548; Houriet *v.* Morris, 3 Camp. 303; Bell *v.* Reid, 1 Maule & S. 726.

[2] Hanger *v.* Abbott, 6 Wall. (U. S.) 532.

[3] *Ante*, §1071.

[4] Lind. Comp. L. 5th ed., p. 37; Ex parte Boussmaker, 13 Ves. 71.

[5] Lind. Comp. L. 5th ed. p. 39; Co. Lit. 380*b;* Dublin &c. R. Co. *v.* Black, 8 Exch. 181; London &c. R. Co. *v.* McMichael, 5 Exch. 114; Newry &c. R. Co. *v.* Coombe, 3 Exch. 565.

[6] Lind. Comp. L. 5th ed., p. 39; Cork &c. R. Co. *v.* Cazenove, 10 Ad. &

If he signs the memorandum of association in England, he thereby becomes a member until he elects to disaffirm;[1] and while, in case of a transfer being made to him, the directors have the power to reject him as a shareholder by reason of his infancy,[2] yet the transfer being voidable only, and not *ipso facto* void, unless they do this, it will be good.[3]

§ **1096. Married Women.** — So many statutory changes have taken place within recent years in respect of the contractual powers and property rights of married women that it is difficult to affirm with much confidence what her power of becoming a shareholder in a corporation is, except in those jurisdictions where the legislature has substantially removed her common-law disabilities, as has been done in Missouri, Mississippi, New York and several other States. By the principles of the common law she cannot contract as a principal, with a few limited exceptions. Where she still rests under the common-law disabilities, she cannot therefore be a party to an original subscription to shares or to a transfer of them, so as to be answerable as a shareholder.[4] She therefore cannot be one of the five subscribers required to join in an application for an incorporation under a statute of Pennsylvania, as the statute contemplates only persons not under disability.[5] But in England the incorporation of a company is not affected by the fact that one of the signers of the memorandum of association is an infant.[6]

§ **1097. Where the Married Woman has an Equitable Separate Estate.**—Where the married woman has an equitable separate estate, she may make contracts with respect to that estate as if she were sole, to the extent that a court of equity will give effect to such contracts by making them a charge upon

El. (N. S.) 935; Leeds &c. R. Co. *v.* Fearnley, 4 Exch. 26; London &c. R. Co. *v.* McMichael, 5 Exch. 114.

[1] Re Nassau Phosphate Co., 2 Ch. Div. 610.

[2] Symons' case, L. R. 5 Ch. 298; *post*, §3271.

[3] Lumsden's case, L. R. 4 Ch. 31. The effect of transfers to infants and to other persons under disability is reserved for future treatment: *post*, §3270, *et seq.*

[4] Lind. Comp. 5th ed., p. 41; Witters *v.* Sowles, 38 Fed. Rep. 700.

[5] Re Application for Charter (Pa. Exec. Dept.), 27 W. N. C. 399.

[6] Re Nassau Phosphate Co., 2 Ch. Div. 610.

her separate estate, provided that was the intent of the parties to the contract.[1] The separate estate here spoken of is carefully to be distinguished from that species of statutory separate estate which is often held to be a *legal estate;* though the difference between the two estates relates rather to the mode of enforcing her engagements in respect of them than otherwise. Where she has an equitable separate estate she can charge it with a debt created in writing, and therefore there would seem to be no doubt that she can charge it by her written contract of subscription to the shares of a joint-stock corporation. Equity would give effect to such a contract, as meaningless and illusory unless it should be treated as a charge upon her separate estate. Where the estate is a statutory legal estate, she may, it has been held, become a stockholder in every sense of the term.[2] Such is understood to be the estate created by the English Married Woman's Property Act, 1882.[3] Here, unless restrained by the terms of the instrument creating the estate, she can deal with it in all respects as a *feme sole.* "She can," says Sir N. Lindley, "invest it in shares and make herself liable to pay for them and to pay calls upon them to the extent of her separate estate, and on the winding up of the company she will be a contributory in respect of her shares to the like extent.[4] Her husband is not liable in respect of such shares."[5] This act contains distinct provisions as to the rights of a married woman as a shareholder,—enabling her to compel the company to register fully paid up shares in her name;[6] providing that shares standing in her sole name shall be deemed to belong to her for her separate use until the contrary is proved;[7] and leaving her alone liable after marriage for calls in respect of shares held before marriage, but subject to the qualification stated in the next section.[8]

[1] Whitesides *v.* Cannon, 23 Mo. 457; Lincoln *v.* Rowe, 51 Mo. 575; Sharpe *v.* McPike, 62 Mo. 308; Davis *v.* Smith, 75 Mo. 225; Bank *v.* Collins, *Id.* 281; Martin *v.* Colburn, 88 Mo. 231, 237.

[2] Witters *v.* Sowles, 38 Fed. Rep. 700.

[3] 45 & 46 Vict., ch. 75.

[4] Citing §§ 6 and 7 of the act; also Matthewman's case, L. R. 3 Eq. 781; Re London &c. Bank, 18 Ch. Div. 581.

[5] Lind. Comp. L. 5th ed., p. 41.

[6] *Id.* §§ 6, 7; see Reg. *v.* Carnatic R. Co., L. R. 8 Q. B. 299.

[7] *Ibid.*

[8] *Id.*, § 14.

§ 1098. Husband's Liability for Calls in Respect of Wife's Shares. — By the principles of the common law the husband is liable for calls in respect of shares held by his wife before marriage.[1] The reason is, roughly speaking, that he gets the shares, — at least he has the power of reducing them into his possession, as *choses in action* belonging to her, which power he exercises, unless there is a marriage settlement providing otherwise. Statutes seem to have modified this rule so as to make him liable to calls made on his wife's shares, whether before or after marriage, if he has in fact obtained by the marriage property of the wife to the value of such calls.[2]

Article II. Private Corporations.

§ 1102. One Corporation cannot Become a Stockholder in Another. — It may perhaps be laid down, as a general rule, that a corporation, unless expressly empowered to do so by its governing statute, cannot subscribe for shares of stock in another corporation.[3]

[1] Lind. Comp. L. 5th ed., p. 42; citing Luard's case, 1 DeGex F. & J. 533; Burlinson's case, 3 DeGex & Sm. 18; Sadler's case, *Id.* 36; Khlut's case, *Id.* 210; White's case, *Id.* 157; Ex parte Hatcher, 12 Ch. Div. 284.

[2] Lind. Comp. L. 5th ed., p. 42; Ex parte Hatcher, 12 Ch. Div. 284; Bell's case, 4 App. Cas. 550.

[3] Berry *v.* Yates, 24 Barb. (N. Y.) 199, 210; Mutual Savings Bank *v.* Meriden Agency Co., 24 Conn. 159; Zabriskie *v.* Railroad Co., 23 How. (U. S.) 381; Hodges *v.* New England Screw Co., 1 R. I. 322; *s. c.* Thomp. Off. Corp. 260; White *v.* Syracuse &c. R. Co., 14 Barb. (N. Y.) 559; Connecticut &c. Ins. Co. *v.* Railroad Co., 41 Barb. (N. Y.) 9; Talmage *v.* Pell, 7 N. Y. 348; New York Exchange Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593; Central R. Co. *v.* Collins, 40 Ga. 582; Hazlehurst *v.* Savannah R. Co., 43 Ga. 13; Sumner *v.*

§ **1103. Reason of the Rule.**— The reason of the rule is that if a corporation could, by buying up the majority of the stock of another corporation, be admitted to vote as a shareholder in the meetings of such other corporation, the purchasing corporation could take the entire management of the business of the latter, however foreign such business might be to that which the purchasing corporation was created to carry on. A banking corporation could thus become the operator of a railroad or of a manufacturing business, and any other corporation could engage in banking by obtaining the control of the stock of an incorporated bank. "Nor would this result follow any the less certainly, if the shares of stock were received in pledge only to secure the payment of a debt, provided the shares were transferred on the books of the company to the name of the pledgee."[1] The reason of the rule was well stated by Mr. Justice Walton: "If a corporation can purchase any portion of the capital stock of another corporation, it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow."[2]

§ **1104. Illustrations: Railroad Companies.**— In conformity with the general principles thus stated ,it has been held, that though a railroad corporation may take the stock of another railroad corporation by way of security for a debt, it has no power to invest its corporate funds in

Marcy, 3 Woodb. & M. (U. S.) 105; Franklin Co. *v.* Lewiston Inst., 68 Me. 43; *s. c.* 28 Am. Rep. 9; Franklin Bank *v.* Commercial Bank, 36 Oh. St. 350; Coppin *v.* Greenlees, 38 Oh. St. 375; *s. c.* 43 Am. Rep. 425; McMillan *v.* Carson Hill Union Mining Co., 12 Phila. (Pa.) 404; Valley R. Co. *v.* Lake Erie Iron Co., 46 Oh. St. 44; *s. c.* 1 L. R. A. 412; People *v.* Chicago Gas Trust Co., 130 Ill. 268; *s. c.* 8 L. R. A. 497; 17 Am. St. Rep. 319; Central R. Co., of New Jersey *v.* Pennsylvania R. Co., 31 N. J. Eq. 475. Compare the following English cases: Great Western R. Co. *v.* Metropolitan R. Co., 23 L. J. Ch. 382; *s. c.* 9 Jur. (N. S.) 562; Ex parte Contract Corp. L. R., 3 Ch. 105; Royal Bank of India's Case, L. R. 4 Ch. 252, 257; Mayor *v.* Baltimore &c. R. Co., 21 Md. 50.

[1] Franklin Bank *v.* Commercial Bank, 36 Oh. St. 350; *s. c.* 38 Am. Rep. 594, opinion by Boynton, J.

[2] Franklin Co. *v.* Lewiston Inst., 68 Me. 43; *s. c.* 28 Am. Rep. 9.

the purchase of such stock.[1] - - - - A railroad company, chartered for the purpose of building and maintaining a railroad from Savannah to Macon, with general powers to purchase and hold personal estate, of any character whatever, was not authorized to become a stockholder in a railroad from Savannah to Bainbridge. Such purchase was wholly beyond the purpose of its charter.[2] - - - - A railroad company organized under the general railroad law of Missouri has no power to purchase the notes given by subscribers to the stock of any other railroad company on account of their subscriptions and enforce them against such subscribers. Nor does the fact that the former railroad company has purchased the road-bed of the latter with the intention of completing its road confer upon it such power.[3]

§ 1105. Further Illustrations: Banking Companies. — A banking corporation, through its president, subscribed to a creamery, but before any act was done or expenditure made on the faith of such subscription, it was withdrawn. It was held that it was simply an executory contract, and that the subscription could at the time be withdrawn, and that the bank was not liable.[4] - - - - One banking corporation received a certificate of two hundred shares of the capital stock of another banking corporation, from the president of the latter corporation, as security for a loan made to him individually. Subsequently the bank making the loan presented the certificate for the shares to the corporation whose shares they were, and demanded a transfer of them to it, on the defendant's books. This transfer was refused, and the lending bank sued the other for a *conversion* of the shares. The governing *statute* prohibited any bank from holding or purchasing stock in another corporation, except to prevent a loss upon a debt previously contracted in good faith. It was held that the action was not maintainable.[5] - - - - The trustees of a savings institution in Maine subscribed for fifty thousand dollars of the capital stock of the Continental Mills, a manufacturing company. Having no money to pay for the shares, the savings institution procured another corporation to advance the money and to take the notes of the savings institution therefor, with a certificate of the stock thus subscribed for in the name of the savings institution, assigned as collateral security for the payment

[1] Millbank *v.* New York &c. R. Co., 64 How. Pr. (N. Y.) 20.

[2] Central R. R. Co. *v.* Collins, 40 Ga. 582.

[3] West End Narrow Guage R. Co. *v.* Dameron, 4 Mo. App. 414.

[4] Holt *v.* Winfield Bank, 25 Fed. Rep. 812.

[5] Franklin Bank *v.* Commercial Bank, 36 Oh. St. 350; *s. c.* 38 Am. Rep. 594.

of the notes. In an action by the corporation which had thus advanced the money, against the savings institution, it was held that the action of the trustees of the savings institution was *ultra vires;* that it is not competent for such an institution, at a time when it has no funds for investment, to purchase stocks, or other property not needed for immediate use, on credit, and thus create a debt binding upon the institution; that the corporation making the advance of money, having participated in the illegal transaction, could not claim the privileges of a *bona fide* holder of commercial paper; and that the savings institution, having received no benefit from the transaction, was not estopped to set up the defense of *ultra vires.*[1]

§ **1106. Other Illustrations.** — A joint-stock corporation, organized, as expressed in their articles of association, "to do a general *insurance agency*, *commission* and *brokerage* business, and such other things as are incidental to, and necessary in, the management of that business," has no power to subscribe to the stock of a savings bank and building association.[2] - - - - A corporation formed under the general incorporation act of Illinois, for a purpose other than dealing in stocks, cannot exercise the power of purchasing corporate shares, except where such a power is necessarily implied from some power specifically granted by the statute. Therefore a *gaslight* company cannot purchase and hold or sell the shares of another gaslight company, although the adventurers who have organized it have assumed to take to themselves such a power in their articles of association.[3]

§ **1107. Cannot Subscribe for or Purchase its Own Stock.** — A corporation has no general power to subscribe for or to purchase shares of its own stock. The principle that an executory contract which is *ultra vires* will not be enforced has been held with reference to an *executory* agreement by a manufactuing corporation to buy shares of its own stock.[4] This is well illustrated by a case where, under the general incorporation law of Oregon, articles were filed to incorporate the Oregon Central Railroad Co., with a capital stock of $7,250,000, divided into 72,500 shares of $100 each. Six persons subscribed one share each, and the seventh subscription was as follows: "Oregon

[1] Franklin Co. *v.* Lewiston Inst. 68 Me. 43; *s. c.* 28 Am. Rep. 9.

[2] Mechanics &c. Bank *v.* Meriden Agency Co., 24 Conn. 159.

[3] People *v.* Chicago Gas Trust Co., 130 Ill. 268; *s. c.* 8 L. R. A. 497; 17 Am. St. Rep. 319.

[4] Coppin *v.* Greenlees &c. Co., 38 Oh. St. 275; *s. c.* 43 Am. Rep. 425.

Central Railroad Company, by G. L. Woods, chairman, seventy thousand shares — seven million dollars." It was held that this subscription was a nullity, and that a board of directors elected by the six persons could not lawfully transact business for the corporation.[1]

§ 1108. Limited View that One Corporation can Invest in the Shares of Another. — A few decisions are met with where the view is taken that a corporation may invest in the stock of other corporations, as well as in any other funds, provided it be done *bona fide*, and with no sinister or unlawful purpose, and there be nothing in its charter, or in the nature of its business, that forbids it.[2] The theory of these cases seems to be that such a purchase is not necessarily void;[3] and it has been held that there is *no presumption* that a corporation is incapable of purchasing and holding shares of the stock of another corporation, it not appearing under what circumstances it was acquired or held.[4] Sir Nathaniel Lindley thinks that "there is no general principle of law which prevents a corporation from holding shares in a company, except the principle that a corporation cannot lawfully employ its funds for purposes not authorized by its constitution." And he adds, citing the authorities in the margin: "It has been assumed by the legislature, in many of the statutes relating to companies, that corporations may lawfully be shareholders,[5] and at common law one corporation may be a member of another.[6] Accordingly it has held that, where the above principle does not apply, one company may hold shares in another;[7] although not in a benefit

[1] Holliday *v.* Elliott, 8 Or. 84.

[2] Booth *v.* Robinson, 55 Md. 419, 433.

[3] Hill *v.* Nisbet, 100 Ind. 341.

[4] Evans *v.* Bailey, 66 Cal. 112. In Mutual Savings' Bank *v.* Meriden Agency, 24 Conn. 159, the court went no further than to declare that a subscription by a corporation to the stock of another corporation, whose objects were in no wise connected with those of the subscribing corporation, is void.

[5] See for example the Companies act 1862, § 23, and the interpretation put on it in the cases cited in note (t); the Industrial and Prov. Soc. act, 39 and 40 Vict., c. 45, § 12 (4); 7 Wm. IV. and 1 Vict., ch. 73, §§ 6 and 10; 7 and 8 Vict., ch. 110, §§ 3 and 7 (8), and § 50.

[6] Grant on Corporations, p. 5.

[7] Ex parte Contract Corp., 3 Ch. 105; Royal Bank of India's case, 4 Ch. 252, and 7 Eq. 91.

building society.[1] Practically, however, it may be said to be *prima facie ultra vires* for one company to hold shares in another: *i. e.*, power to do so must be shown to be expressly or impliedly given to it.'' [2]

§ **1109. Illustrations.** — For instance, the Supreme Court of Tennessee has taken the view that there is no legal objection to the holders of the stock of an *insurance* corporation purchasing the stock and franchises of a *bank*. This is not regarded as an absorption of the bank franchises by the insurance corporation.[3] - - - - Under statutes of Kansas, a *railroad* company has the power to purchase and hold the stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own.[4] - - - - A company organized for the purpose of owning, developing and disposing of a large quantity of wild and inaccessible *land*, with power to build a railroad not more than twenty miles in length, has power, it seems, to subscribe to the stock of a railroad, the building of which is necessary to afford access to the subscribing company's lands.[5] - - - - The West Virginia statute which forbids one corporation to subscribe for or purchase the bonds or stock of another corporation except in payment of a *bona fide* debt, is held not to preclude advances made on bonds and stock as *collateral security*.[6]

§ **1110. Consequences which Flow from this View.**— Where the view obtains that one corporation may rightfully purchase and hold the shares of stock of another, the ordinary *liabilities of a stockholder* attach to the corporation which so acts. Thus, where a banking firm purchased in their own name shares

[1] Dobison *v.* Hawks, 16 Sim. 407. A corporation cannot be treasurer of a friendly society. Ex parte Swansea Friendly Society, 11 Ch. D. 768.

[2] See Great W. Rail. Co. *v.* Metrop. Rail. Co., 9 Jur. (N. S.) 562; Ex parte Contract Corp., 3 Ch. 105; Ex parte British Nation &c. Ass., 8 Ch. Div. 679, where it was held that a society to which shares in another society had been transferred by an act *ultra vires*, could not be placed on the list of contributories of that society. Lind. Comp. 5th ed. p. 43.

[3] State *v.* Butler, 86 Tenn. 614. Circumstances under which a purchase by a *life insurance* company of the stock of a *fire insurance* company will not be set aside because fully executed. Alexander *v.* Jones, 8 Mo. App. 589, 591.

[4] Atchison &c. R. Co. *v.* Fletcher, 35 Kan. 236; Atchison &c. R. Co. *v.* Cochran, 43 Kan. 225; *s. c.* 7 L. R. A. 414; 23 Pac. Rep., 151; Atchison &c. R. Co. *v.* Davis, 34 Kan. 209. Compare Pullman Palace Car Co. *v.* Missouri Pacific R. Co., 115 U. S. 587.

[5] Watts' Appeal, 78 Pa. St. 370, 392.

[6] Taylor County Court *v.* Baltimore &c. R. Co., 35 Fed. Rep. 161.

of stock for a customer, which they treated as their own, and so made it appear on the books of the corporation issuing the stock, it was held that they assumed the liability of stockholders as between themselves and the corporation.[1] But it seems that a corporation cannot, by merely purchasing the shares of another corporation, and thereby acquiring control of it, succeed to its special *franchises*. Thus, it is held in Massachusetts that the fact that one corporation has purchased the property and most of the capital stock of another corporation does not necessarily authorize the purchasing corporation to do that which, under a special act, the other corporation is authorized to do, but which the general law prohibits.[2]

§ 1111. Undoing Such Transactions: Estoppel — Laches.— Although a corporation may not possess the power to deal in the shares of another corporation, yet one who has purchased from a corporation the shares of another corporation, will not be allowed to escape the payment of the purchase money by setting up such want of power.[3] The estoppel works also against the corporation so assuming to act. Thus, a railroad company was held estopped to deny its liability under a contract by which it loaned the sum of $150,000 to another railroad company, whose road it had leased, taking as security 1,500 shares of the stock of the lessor company. The court found, however, that the contract was within the scope of the powers of the lessee corporation; that it had been entered into by the proper officers and had been recognized by corporate acts; and the holding was that the lessee company was estopped from setting up that its officers were not authorized to make the contract.[4] In short, it seems that a defense of want of power so to act will not avail where there has been *laches*,[5] or were the other party to the contract cannot be put *in statu quo*.[6]

[1] McKim *v.* Glenn, 66 Md. 479; *s. c.* 8 Atl. Rep. 130; 5 Cent. Rep. 776; 9 East. Rep. 901.

[2] French *v.* Connecticut River Lumber Co., 145 Mass. 261.

[3] Holmes & Griggs Man. Co. *v.* Holmes & Wessel Metal Co., 53 Hun (N. Y.), 52; *s. c.* 5 N. Y. Sup. p. 937.

[4] Peterborough R. Co., *v.* Nashua &c. R. Co. 59 N. H. 385.

[5] Boston &c. R. Co. *v.* New York &c. R. Co., 13 R. I. 260.

[6] Terry *v.* Eagle Lock Co., 47 Conn. 141.

Article III. Municipal Corporations.

§ **1115. Validity of Municipal Subscriptions to Private Corporations.** — Whether the legislature of a State has the power to authorize cities, towns or counties to subscribe for the shares of private corporations, and to exert the taxing power to raise money to pay such subscriptions, depends for the most part on the question whether the *object*, as far as it affects the public, which the corporation is organized to promote, is a *public object* as distinguished from a merely private enterprise. As presently seen,[1] nearly all American courts hold that municipal aid may be extended in this form to corporations organized for the building and operating of *railroads*, *turnpike roads*,[2] and *plank roads*.[3] But it is equally clear that, under our American State constitutions, such aid cannot be extended to corporations which are

[1] *Post*, §1118.

[2] Com. *v.* McWilliams, 11 Pa. St. 62.

[3] Wetumpka *v.* Winter, 29 Ala. 651.

organized to promote merely private enterprises, because of some supposed collateral benefit which may thereby accrue to the public.[1]

§ 1116. Illustrations of the Principle: Aid to Railroad Companies Valid — to Manufacturing Companies not. — To illustrate this principle let us take a case which arose under the constitution of Alabama, which provided that private property shall not be taken "for public use, or for the use of corporations other than municipal, without the consent of the owner," and that "the State shall not engage in works of internal improvement, but its credit, in aid of such, may be pledged by the General Assembly on undoubted security." Construing these provisions, it has been held that the legislature has power to authorize a county, as a body corporate, on a popular vote of the county, to subscribe for stock in a railway company; and that, for the payment of the stock so subscribed, the county may be compelled by *mandamus* to issue its bonds and deliver them to the railway company.[2] Let us throw into contrast with this a case where a statute authorized a municipal corporation, with the consent of a majority of the owners of taxable property, to subscribe for the stock of a *private manufacturing corporation* and to issue bonds in payment thereof. Here it was held (1) that the statute was unconstitutional and void, inasmuch as it attempted to authorize taxation for other than public purposes; (2) that the fact that the establishment of the business of the corporation would tend to increase the business prosperity of the town did not render its purpose a public use; and, (3) that the town was not estopped from denying the validity of the bonds by the fact that it had previously voted a special tax to pay the interest thereon.[3]

[1] Weismer *v.* Douglas, 64 N. Y. 91; *s. c.* 21 Am. Rep. 586; Loan Asso. *v.* Topeka, 20 Wall. (U. S.) 655; Olcott *v.* Supervisors, 16 Wall. (U. S.) 689; People *v.* Salem, 20 Mich. 452; Jenkins *v.* Andover, 103 Mass. 94; Whiting *v.* Fond du Lac, 25 Wis. 188; Allen *v.* Jay, 60 Me. 124.

[2] Ex parte Selma &c. R. Co., 45 Ala. 696; *s. c.* 6 Am. Rep. 722.

[3] Weismer *v.* Douglas, 64 N. Y. 91; *s. c.* 21 Am. Rep. 586; denying Allegheny City *v.* McClunkan, 14 Pa. St. 81; commending Thomas *v.* Richmond, 12 Wall. (U. S.) 349. This decision falls in the wake of Loan Association *v.* Topeka, 20 Wall. (U. S.) 655, where it was held that an act authorizing a municipal corporation to use the power of taxation in aid of a private manufacturing company was void, as exceeding those implied reservations of power which exist in every free government. The power of a municipal corporation to lend its credit to a private manufacturing corporation to enable it to erect its works in the town was denied by

§ 1117. Rule in the Absence of Direct Constitutional Restraints.— Nor does it appear necessary that there should be any direct constitutional restraint upon the power of the legislature of a State to authorize taxation for merely private objects, in order to render void municipal aid to corporations organized to promote such objects. The Supreme Court of the United States has declared that the power of taxation can only be exerted for public purposes, and has laid down the broad rule that in free governments there is an implied reservation of power which prevents the legislature from passing an act whereby, through the forms of taxation and under the guise of promoting the public benefit, the property of A. is taken away from him and given to B. "It must be conceded," said Mr. Justice Miller, speaking for the court, "that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B., who were

the Supreme Judicial Court of Maine in Allen *v.* Jay, 60 Me. 124. On like grounds the power of a municipal corporation to aid by taxation a private school not under the control of the town authorities has been denied. Jenkins *v.* Anderson, 103 Mass. 74; Curtis *v.* Whipple, 24 Wis. 350.

husband and wife to each other, should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D.; or which should enact that the homestead now owned by A. should be no longer his, but should henceforth be the property of B.[1]

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute; but in most instances for which taxes are levied, as the support of government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government. The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch *v.* The State of Maryland,[2] that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the national banks drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay with one hand the power of the government on the property of the citizens, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation. A 'tax' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen

[1] Citing Whiting *v.* Fond du Lac, 25 Wis. 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, 587.

[2] 4 Wheat. (U. S.) 431.

by government for the use of the nation or State. Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'[1]

"Coulter, J., in Northern Liberties *v.* St. John's Church,[2] says, very forcibly, 'I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations — that they are imposed for a public purpose.'

"We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a *public purpose.* It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. It is undoubtedly the duty of the legislature, which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use; and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local

[1] Citing Cooley Const. Lim. 479.

[2] 31 Pa. St. 104. See also Pray *v.* Northern Liberties, 31 *Id.* 69; Matter of Mayor of New York, 11 Johns. (N. Y.) 77; Camden *v.* Allen, 2 Dutch. (N. J.) 398; Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147, 167; Hanson *v.* Vernon, 27 Iowa, 47; Whiting *v.* Fond du Lac, 25 Wis. 188.

public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town." [1]

§ 1118. Validity of Statutes Authorizing Municipal Subscriptions to Railway Corporations. — Most of the American courts have held that *enabling statutes*, which confer upon municipal corporations the power to issue their bonds in aid of railways and to exchange them for the stock of railway companies upon the consent of the municipality being had in a prescribed manner, are constitutional and valid. The opinion of Mr. Justice Valentine of Kansas in the leading case in that State [2] is a treatise on this subject. The great industry of the learned judge collected the decisions of the various States upon the subject, from which it appears that the question has been settled in favor of the power of the legislature to authorize such aid in Virginia; [3] in Connecticut; [4] in Pennsylvania; [5] in Tennessee; [6] in Kentucky; [7]

[1] Loan Association *v.* Topeka, 20 Wall. (U. S.) 662–665.

[2] Commissioners *v.* Miller, 7 Kan. 479; *s. c.* 12 Am. Rep. 425.

[3] Goodin *v.* Crumps, 8 Leigh (Va.), 120; Harrison Justices *v.* Holland, 3 Gratt. (Va.) 247; Langhorne *v.* Robinson, 20 *Id.* 661; *s. c.* 5 Call (Va.), 139.

[4] Bridgeport *v.* Housatonic R. Co., 15 Conn. 475; see also Society for Savings *v.* New London, 29 *Id.* 174.

[5] Harvey *v.* Lloyd, 3 Pa. St. 331; Com. *v.* McWilliams, 11 *Id.* 62 (a turnpike case); Sharpless *v.* Philadelphia, 21 *Id.* 147; *s. c.* 59 Am. Dec. 159; Moers *v.* Reading, *Id.* 188; Com. *v.* Commissioners, 32 *Id.* 218; Com. *v.* Pittsburgh, 41 *Id.* 278; Com. *v.* Perkins, 43 *Id.* 400.

[6] Nichol *v.* Nashville, 9 Humph. (Tenn.) 252, 271; Louisville &c. R. Co. *v.* Davidson County, 1 Sneed (Tenn.), 637; *s. c.* 62 Am. Dec. 424; Hord *v.* Rogersville &c. R. Co., 3 Head (Tenn.), 208; Byrd *v.* Ralston, *Id.* 477; Campbell County *v.* Knoxville &c. R. Co., 6 Coldw. (Tenn), 598.

[7] Talbot *v.* Dent, 9 B. Monr. (Ky.) 526; Justices *v.* Turnpike Co., 11 *Id.* 143; Slack *v.* Maysville &c. R. Co., 13 *Id.* 1; Maddox *v.* Graham, 2 Metc. (Ky.) 56.

in Illinois; [1] in Florida; [2] in Ohio; [3] in Louisiana; [4] in Iowa; [5] in Alabama; [6] in Mississippi; [7] in North Carolina; [8] in Missouri; [9] in New York; [10] in South Carolina; [11] in Georgia; [12] in Indiana; [13] in Wisconsin; [14] in California; [15] in Maine; [16] and in the Supreme Court of the United States. [17]

[1] Ryder *v.* Railroad Co., 13 Ill. 516; see also Prettyman *v.* Tazewell County, 19 *Id.* 406; *s. c.* 71 Am. Dec. 230; Robertson *v.* Rockford, 21 *Id.* 451; Johnson *v.* Stark County, 24 *Id.* 75; Perkins *v.* Lewis, *Id.* 208; Butler *v.* Dunham, 27 *Id.* 474; Clarke *v.* Hancock County, *Id.* 305; Piatt *v.* People, 29 *Id.* 54; Keithsburg *v.* Frick, 34 *Id.* 405.

[2] Cotton *v.* County Commissioners, 6 Fla. 610.

[3] Railroad Co. *v.* Clinton County, 1 Oh. St. 77; Steuben &c. R. Co. *v.* Treasurer N. Township, *Id.* 105; Cass *v.* Dillon, 2 *Id.* 607; Thompson *v.* Kelly, *Id.* 647; State *v.* Van Horne, 7 *Id.* 327; State *v.* Union Township, 8 *Id.* 394; State *v.* Hancock County, 12 *Id.* 596; Knox *v.* Nichols, 14 *Id.* 260; Fosdick *v.* Perrysburg, *Id.* 472; Shoemaker *v.* Goshen Township, *Id.* 569.

[4] Police Jury *v.* Succession of McDonough, 8 La. An. 341; New Orleans *v.* Graible, 9 *Id.* 561; Parker *v.* Scogin, 11 *Id.* 629; Railroad Co. *v.* Parish of Ouachita, *Id.* 649.

[5] Dubuque &c. R. Co. *v.* Dubuque, 4 G. Greene (Ia.), 1; State *v.* Bissell, 4 *Id.* 328; Clapp *v.* Cedar County, 5 Ia. 15; *s. c.* 68 Am. Dec. 678; Ring *v.* Johnson County, 6 Ia. 265; McMillan *v.* Boyles, *Id.* 304; McMillan *v.* Lee County, *Id.* 391; Whittaker *v.* Johnson County, 10 *Id.* 161.

[6] Stein *v.* Mobile, 24 Ala. 591; Wetumpka *v.* Winter, 29 *Id.* 651 (plank road case); Gibbons *v.* Mobile &c., 36 *Id.* 410; Ex parte Selma &c. R. Co., 45 Ala. 696; *s. c.* 6 Am. Rep. 722.

[7] Strickland *v.* Mississippi Central R. Co., referred to in Williams *v.* Cammack, 27 Miss. 224; *s. c.* 61 Am. Dec. 508.

[8] Taylor *v.* Newberne, 2 Jones, Eq. (N. C.) 141; *s. c.* 64 Am. Dec. 566, a navigation case; Caldwell *v.* Justices of Burke, 4 *Id.* 323.

[9] St. Louis *v.* Alexander, 23 Mo. 483; Flagg *v.* Palmyra, 33 *Id.* 440; St. Joseph &c. R. Co. *v.* Buchanan County, 39 *Id.* 485.

[10] Grant *v.* Courter, 24 Barb. (N. Y.) 232; Benson *v.* Albany, *Id.* 248; Clarke *v.* City of Rochester, *Id.* 446; Bank of Rome *v.* Rome, 18 N. Y. 38; Gould *v.* Town of Venice, 29 Barb. 442; Starin *v.* Genoa, 23 N. Y. 439; Clarke *v.* Rochester, 28 *Id.* 605; People *v.* Mitchell, 45 Barb. 208; People *v.* Mitchell, 35 N. Y. 551.

[11] Copes *v.* Charleston, 10 Rich. Law (S. C.) 491.

[12] Winn *v.* Macon, 21 Ga. 275; Powers *v.* Inf. Court of Dougherty County, 23 *Id.* 65.

[13] Aurora *v.* West, 9 Ind. 74; Evansville &c. R. Co. *v.* Evansville, 15 *Id.* 395; Bartholomew *v.* Bright, 18 *Id.* 93; Aurora *v.* West, 22 *Id.* 88; *s. c.* 85 Am. Dec. 413.

[14] Clark *v.* Janesville, 10 Wis. 136; Bushnell *v.* Beloit, *Id.* 195.

[15] Pattison *v.* Yuba County, 13 Cal. 175; Hobart *v.* Butte County 17 *Id.* 23; Robinson *v.* Bidwell, 22 *Id.* 379; French *v.* Teschemaker, 24 *Id.* 518; People *v.* Coon, 25 *Id.* 635; People *v.* San Francisco, 27 *Id.* 655.

[16] Augusta Bank *v.* Augusta, 49 Me. 507.

[17] Knox County *v.* Aspinwall, 21 How. (U. S.) 539; Knox County *v.*

§ 1119. Power to Grant such Aid by Way of Subscription Settled. — In the leading case in Kansas, referred to in the preceding paragraph,[1] Mr. Justice Valentine showed that only one State, by its court of last resort, had ever pronounced against the power of the legislature to enable counties and municipal corporations to *subscribe for stock* in railroad companies and to issue their bonds in *payment* therefor, as distinguished from the mere power to make *donations* to railroad companies; and that was the State of Iowa.[2] He regarded all these decisions as being overruled by decisions of the Supreme Court of the United States.[3] He regarded later cases in Iowa as impugning the principle that such statutes are unconstitutional.[4] He pointed out that these earlier decisions in Iowa had been finally overthrown in that State.[5] "Hence," he concluded, "no court of last resort can now be found, that holds that county and municipal aid to railway companies, by way of subscription to the capital stock thereof, is not a legitimate subject of legislation."[6]

Wallace, *Id.* 547; Zabriskie *v.* Cleveland &c. R. Co., 23 *Id.* 381; Bissell *v.* Jefferson, 24 *Id.* 287; Amey *v.* Allegheny County, *Id.* 365: Knox County *v.* Aspinwall, *Id.* 376; Woods *v.* Lawrence County, 1 Black (U. S.), 386; Moran *v.* Miami Co., 2 Black (U.S.), 722; Mercer Co. *v.* Hackett, 1 Wall. (U. S.) 83; Gelpcke *v.* Dubuque, *Id.* 175; Seybert *v.* Pittsburg, *Id.* 273; Van Hostrup *v.* Madison City, *Id.* 291; Meyer *v.* Muscatine, *Id.* 384; Sheboygan Co. *v.* Parker, 3 Wall. (U. S.) 93; Havemeyer *v.* Iowa Co., *Id.* 294; Thomson *v.* Lee Co., *Id.* 327; Rogers *v.* Burlington, *Id.* 654; Mitchell *v.* Burlington, 4 Wall. (U. S.) 270; Larned *v.* Burlington, *Id.* 275; Von Hoffman *v.* Quincy, *Id.* 535; Riggs *v.* Johnson Co., 6 Wall. (U. S.) 166; Weber *v.* Lee Co., *Id.* 210; United States *v.* Keokuk, *Id.* 514; Same *v.* Same, *Id.* 518; Lee County *v.* Rogers, 7 Wall. (U. S.) 181; City *v.* Lamson, 9 Wall. (U. S.) 477.

[1] Commissioners *v.* Miller, 7 Kan. 479; *s. c.* 12 Am. Rep. 425.

[2] State *v.* Wapello County, 13 Ia. 388; Chamberlain *v.* Burlington, 19 Ia. 395; McClure *v.* Owen, 26 Ia. 243.

[3] Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175; Meyers *v.* Muscatine, 1 Wall. (U. S.) 384; Thomson *v.* Lee County, 3 Wall. (U. S.) 327; Rogers *v.* Burlington, 3 Wall. (U. S.) 364; Riggs *v.* Johnson County, 6 Wall. (U. S.) 166; Weber *v.* Lee County, 6 Wall. (U. S.) 210; United States *v.* Council of Keokuk, 6 Wall. (U. S.) 514, 518; Benbow *v.* Iowa City, 7 Wall. (U. S.) 313; Lee County *v.* Rodgers, 7 Wall. (U. S.) 181.

[4] Hansen *v.* Vernon, 27 Ia. 28; *s. c.* 1 Am. Rep. 215; Stewart *v.* Supervisors, 30 Ia. 10; *s. c.* 1 Am. Rep. 328.

[5] By the case of Stewart *v.* Supervisors, 30 Ia. 10; *s. c.* 1 Am. Rep. 238.

[6] Commissioners *v.* Miller, 7 Kan. 479; *s. c.* 12 Am. Rep. 425, 443.

§ 1120. Whether Power Exists to Make Donations to such Companies. — The power of the legislature to authorize counties and municipal corporations to make *donations* to railway companies and to levy taxes for such purposes, has been distinguished in several cases from the power to aid the public objects of such companies by subscribing for their stock and issuing bonds in payment therefor and laying taxes to pay the interest and principal of the bonds. Several States have denied the power of the legislature to authorize counties and municipalties to make such donations.[1] In some of the States where there are decisions against the validity of *donations*, there are decisions in favor of the validity of *subscriptions*.[2] In some of the decisions which have been pronounced against the validity of donations, a labored effort is made to take a distinction between subscriptions and donations.[3] But it is too plain for much discussion that there is no foundation for such a distinction. If the legislature has the power to authorize municipal taxation in *aid* of a railway company, it is because the establishment of a railway is a *public object*. On the other hand, if the establishment of a railway is a mere private object, it is undeniably certain that the legislature has not the power to authorize municipal taxation for the purpose of purchasing shares in corporations created for such a private object. If the legislature can authorize such a use of the taxing power, it can authorize municipalities to go into any sort of private business and to tax their inhabitants for the money

[1] Sweet *v.* Hulbert, 51 Barb. (N. Y.) 312; Whiting *v.* Sheboygan &c. R. Co., 25 Wis. 167; *s. c.* 3 Am. Rep. 30; People ex rel. *v.* Salem, 20 Mich. 452; *s. c.* 4 Am. Rep. 400. The case of Hanson *v.* Vernon, 27 Ia. 28, *s. c.* 1 Am. Rep. 215, was subsequently overruled in the same State by Stewart *v.* Supervisors, 30 Ia. 10; *s. c.* 1 Am. Rep. 238.

[2] Thus, the Court of Appeals of New York has decided in favor of the validity of subscriptions in the following cases: Bank of Rome *v.* Rome, 18 N. Y. 38; Starin *v.* Genoa, 23 N. Y. 439; Carke *v.* Rochester, 28 N. Y. 605; People *v.* Mitchell, 35 N. Y. 551. So, the Supreme Court of Wisconsin, while, as above shown, deciding against the validity of donations, had previously decided in favor of the validity of subscriptions. Clark *v.* Janesville, 10 Wis. 136; Bushnell *v.* Beloit, 10 Wis. 195.

[3] Whiting *v.* Sheboygan &c. R. Co., 28 Wis. 167, 186, 209; Sweet *v.* Hulbert, 51 Barb. (N. Y.) 312. See also note of Mr. Chief Justice Dillon who wrote the opinion of the court in Hanson *v.* Vernon (27 Ia. 35; *s. c.* 1 Am. Rep. 215), published in 9 Am. L. Reg. (N. S.) 172, 175.

necessary to be raised for the purpose. Besides, the history of American railway management shows that the town really gets as much in the first case as in the second case. It is held by the Supreme Court of Illinois, that a railway company being a public object in behalf of which the power of taxation may be exercised, an act of the legislature authorizing towns to appropriate money as a *donation* to aid in the construction of a railway is constitutional.[1]

§ 1121. Right to Municipal Aid not Created by General Words.— But general words in a statute, regulating the opening of subscription books of a railroad company, reciting that "it shall be lawful for * * * the agent of any corporate body" to subscribe, will not be construed as enabling municipal corporations to make subscription. The meaning should be restricted to private and business corporations.[2]

§ 1122. Right to Municipal Aid Passes to New Company on Consolidation.— As already seen,[3] the doctrine of the Federal courts, and of many of the State courts, is that if one of two original companies enjoys, under its charter or an act of the legislature, the right to have municipal aid voted in its favor, this right, being in the nature of a privilege to the company, will pass upon a consolidation to the new company.[4] An attempt has been made by the Supreme Court of Missouri to limit this principle, by holding that if a county subscription thus authorized has been made to and accepted by a railway company prior to consolidation with another company, the right to receive the bonds in compliance with the subscription will accrue to the new company; otherwise not.[5] The Missouri court accordingly hold that if, before a subscription has been thus made and accepted, a constitutional ordinance is established or a general statute enacted, changing the terms upon which the subscription might

[1] Chicago &c. R. Co. *v.* Smith, 62 Ill. 268; *s. c.* 14 Am. Rep. 99.

[2] Township of East Oakland *v.* Skinner, 94 U. S. 255; Campbell *v.* Paris &c. R. Co., 71 Ill. 611.

[3] *Ante*, § 366.

[4] Robertson *v.* Rockford, 21 Ill. 451.

[5] Wagner *v.* Meety, 69 Mo. 150; Harshman *v.* Bates County, 92 U. S. 569; State ex rel. *v.* Garroutte, 67 Mo. 446; overruling State ex rel. *v.* Greene County Court, 54 Mo. 540.

otherwise have been made to the railway company, *e. g.*, by providing that it can only be made when sanctioned by a vote of the people of the county, — the consolidated company will not have the right to have the subscription made under the provisions of the charter of the old company, and tax-payers will be entitled to an injunction against such a subscription.[1]

§ **1123. Statute Repealed before Right Vested.** — It is a principle of constitutional law that it is competent for the legislature to repeal a statute granting a right, at any time before the right has become vested. As just seen, the privilege conferred upon a railway company by a special charter granted by the legislature, of having subscriptions made to it by the county courts without the sanction of a popular vote, is not a vested right, unless such a subscription is made to or accepted by the company, and until that time it can be withdrawn.[2]

§ **1124. An Illustration of this Principle.** — In the leading case on the subject in the Supreme Court of the United States, it appeared that the charter of the Ohio and Mississippi Railroad Company, passed by the legislature of the State of Indiana in 1848, and a supplement thereto passed in 1849, authorized the county commissioners of the counties through which the road should pass, to subscribe for its stock and issue bonds in payment of the subscription, provided that a majority of the qualified voters of the county should vote, at an election held on the 1st of March, 1849, that this should be done. The election was held on the appointed day, and a majority of the qualified voters voted that the subscription should be made. But before the subscription *was made* the State adopted a new constitution, which went into effect the first day of November, 1851. One of the articles of this constitution prohibited such subscriptions unless paid for in cash, and also prohibited counties from loaning their credit or borrowing money to pay such subscriptions. Nevertheless, in 1852, the county commissioners of the particular county subscribed for stock in the railroad company, in pursuance of the vote at the election in 1849, and issued the bonds of the county in payment therefor. It was held that the bonds, having

[1] Wagner *v.* Meety, 69 Mo. 150; State ex rel. *v.* Garroutte, 67 Mo. 445.

[2] Wagner *v.* Meety, 69 Mo. 150; State ex rel. *v.* Garroutte, 67 Mo. 445; St. Joseph &c. R. Co. *v.* Buchanan County Court, 39 Mo. 485; Aspinwall *v.* Commissioners, 22 How. (U. S.) 364. Compare Nugent *v.* Supervisors, 19 Wall. (U. S.) 241.

been issued in violation of the constitution of Indiana, were void; and that the railroad company had acquired no right to have them issued to it, which was protected by the constitution of the United States.[1]

§ 1125. Another Illustration of the Same Principle. — Another illustration of the same principle is found in a case where the legislature of Kentucky had authorized a county to subscribe to the stock of a railway company, upon a vote of the electors of the county approving the subscription. A vote resulted in favor of making the subscription; but the county court refused to subscribe and to levy the tax. The company applied for a *mandamus* against the judges of the county court, which was refused. From this judgment an appeal was taken. Pending the appeal, the legislature repealed the law authorizing the county to make the subscription. It was held that while, on the condition of facts before the inferior court, the *mandamus* ought to have been granted, yet, inasmuch as the county court had not made the subscription and levied the tax, no right to the subscription had become vested in the railway company prior to the repeal of the law; and the judgment was therefore affirmed.[2]

§ 1126. Invalidity of State Statutes Attempting to Take away the Remedy on such Subscriptions. — Where such subscriptions have been made by municipal corporations and accepted by the railroad company, subsequent State statutes repealing or substantially impairing the remedy on the same, which existed at the time of the acceptance, are unconstitutional.[3] The case below cited and other cases hold that when a municipal corporation, having a general power to levy taxes to pay its debts, enters into a contract, the legislature cannot take away or substantially impair the right to compel the corporation, by *mandamus*, to exert its taxing power.[4]

§ 1127. Validity of Statutes Transferring Benefit of Subscription from the County to the Tax-payers. — But the inhibition against impairing the obligation of contracts and against

[1] Aspinwall *v.* Commissioners, 22 How. (U. S.) 364.

[2] Covington &c. R. Co. *v.* Kenton County, 12 B. Monr. (Ky.) 148. Compare McIndoe *v.* Jones, 6 Wis. 334.

[3] Western Ark. Bank *v.* Sebastian County, 5 Dillon (U. S.) 414; United States *v.* Lincoln County, *Id.* 184; United States *v.* Johnson County, *Id.* 207.

[4] Rahway Tax Assessors *v.* State, 44 N. J. L. 395.

impairing vested rights does not exist in favor of municipal corporations; and therefore where the county has, under an act of the legislature, subscribed to the stock in a railroad company, and issued its bonds and received the share certificates, it is competent for the legislature, by a subsequent act, to provide that the shares shall be turned over to the tax-payers in proportion to the amount of taxes they respectively paid under the particular subscription.[1]

§ 1128. Instances of Such Statutes Impairing the Obligation of Contracts. — In New Jersey a contract was made by commissioners of public roads; but their charter was held to be unconstitutional; whereupon it was repealed, but the contract was, by the repealing act, validated and made obligatory on the defendants, and they were authorized to issue bonds and borrow money to pay the sums due thereunder. Afterwards an act was passed that bonds should only be issued upon petition and resolution of the tax-payers. It was held that the latter act impaired the obligation of the contract, and was therefore unconstitutional.[2] - - - - In 1858 an amendment to the constitution of Minnesota was adopted providing for the issue of certain bonds called "Minnesota State Railroad Bonds." In 1860 another amendment to the same constitution was adopted, providing that "no law levying a tax or making other provisions for the payment" of the bonds should take effect until submitted to the people and voted for by a majority of them. It was held that the latter amendment impaired the obligation of the contract created by the issue of bonds under the former amendment, and was void.[3]

§ 1129. Invalidity of Statute Compelling Town to Subscribe to a Railway. — A distinction is taken, in respect of the powers and duties of a municipal corporation, between those which are

[1] Lucas *v.* Commissioners of Tippecanoe County, 44 Ind. 524.

[2] State *v.* Union, 44 N. J. L. 259.

[3] State *v.* Young, 29 Minn. 474. It has been held that a statute which, in effect, only provides a mode of determining which of bonds purporting to have been issued by it are valid, and which invalid, impairs the obligation of no contract. Whaley *v.* Gaillard, 21 S. C. 560. The provision of N. Y. Acts 1880, ch. 59, § 4, discharging the city of Yonkers from liability on its negotiable bonds stolen from the Manhattan Savings Bank, upon delivery of duplicate bonds to the bank, is unconstitutional, as impairing the obligation of the contract, and therefore the provision requiring the city to issue such duplicate bonds is unconstitutional also, it being a part of the invalid scheme. People *v.* Otis, 90 N. Y. 48.

of a *public or governmental* character, and those which are of a *private* nature. The distinction is referred to by the courts chiefly for the purpose of determining the liability of the municipal corporation for *torts*, — the general view being that, in respect of public or governmental acts, it is not liable for the torts of its agents, whereas, in respect of an act done in its private character,— that is, where it acts, so to speak, as a private corporation, — it is liable for the torts and neglects of its agents.[1] One of the grounds on which the distinction is sometimes placed is that the performance of duties of a public or governmental character, such as maintaining a board of police, or a board of health, or a fire department, may be made in a sense *compulsory* by the legislature. Pursuing the same idea, it has been held that an act of the legislature requiring a town, without its consent, to issue bonds for raising money which is to be expended in the construction of highways in the town, in a manner prescribed by the act, is constitutional. The theory of the decisions in general is that the making and improving of public highways and providing the means therefor, are appropriate subjects of legislation; that towns possess such powers as are conferred by the legislature; that they are a part of the machinery of the State government and perform certain important functions, subject to the regulation and control of the legislature; and that such a statute is merely the exercise of the unquestioned power of the legislature to determine what highways shall be constructed, and how the taxing power shall be exercised in providing the means to defray the expenses thereof.[2] But, a railway company being organized for an object partly private, that is, to operate a railway for the profit of its stockholders, the mere fact that the railway is, in a sense, a public object and a public benefit, does not, it has been held, place it within the constitutional power of the legislature to pass a mandatory statute, requiring a town to become a stockholder in a railroad, by exchanging its bonds for the stock of the railway company upon the terms prescribed by the statute, without its consent.[3] The constitutional power of the legislature to *force* a municipal corporation to engage in a private business was denied

[1] 2 Thomp. Neg. 734.

[2] People *v.* Flagg, 46 N. Y. 401.

[3] People ex rel. &c. *v.* Batchellor, 53 N. Y. 128; *s. c.* 13 Am. Rep. 480.

by the legislature of Vermont, in a case where it was held that a statute providing for the appointment of an agent of a town by the county commissioners, which agent should have power to purchase *intoxicating liquors* on the credit of the town, and to sell the same for certain specified purposes, and account for and pay over the proceeds to the town in a manner prescribed; and that the town, not having consented to the appointment of the agent, or ratified his contracts, was not liable for the liquors purchased upon its credit by him pursuant to the act.[1]

§ 1130. Injunction to Prevent Issue of Bonds where Terms of Subscription not Complied with. — If a railway company fails to comply with the conditions upon which a county has made a subscription to its stock, an injunction will lie to prevent the company from receiving the bonds agreed to be issued in payment of its shares and to compel the surrender and cancellation of any already issued, and this remedy may be invoked by any one who is a citizen and tax-payer of the county. "Otherwise it would prove but a vain and useless formality for the county court to impose any conditions precedent to the issuance of bonds; they might subscribe for a road in one direction and have to put up with one in another, built in total defiance of the terms of subscription."[2]

§ 1131. Release of Subscription by Abandonment of the Work. — As a general rule, the mere fact that a corporation abandons its work is no defense to an action to collect what is due from its stockholders; since the very means which they are withholding from it may prevent it from resuming its work.[3] But there may be a just exception to this principle where the corporation has totally abandoned the purpose which induced a municipal subscription to its stock, and substituted in its stead some other purpose of no benefit to the municipality; since, in such a case, the collection of the municipal subscription would result in the diversion of money raised by public taxation to an

[1] Atkins *v.* Randolph, 31 Vt. 226. Compare Olcott *v.* Supervisors, 16 Wall. (U. S) 678.

[2] Wagner *v.* Meety, 69 Mo. 150.

[3] *Post*, § 1272.

object never intended by the subscription. Thus, in a case in Kentucky, a company was authorized by its charter to improve the navigation of a certain river by "building additional locks and dams."[1] A county, which would have been benefited by such improvements, was a subscriber to stock in the company. The company abandoned the building of the new locks and dams, and commenced the work of repairing old ones, which work did not benefit the county. It was held, on the company becoming insolvent, that, as the inducement for the subscription was the building of additional locks and dams, the county was not liable, on the abandonment of the work, to pay its subscription, at the suit of creditors of the company holding claims originating subsequent to such abandonment.[2] A well recognized exception to this rule obtains in cases where the municipal corporation has issued its *negotiable bonds* in payment of its subscription, and such bonds have passed into the hands of *bona fide* purchasers for value without notice of equities;[3] but this opens up a subject which is foreign to the purpose of this treatise.

§ 1132. Petition "Representing a Majority of the Tax-payers," etc. — A statute of New York[4] relating to the issue of railway aid bonds by municipal corporations, provided that "whenever a majority of the tax-payers of any municipal corporation," etc., "shall apply to the county judge by petition, setting forth that they are such majority of tax-payers, and represent such a majority of tax-paying property," further proceedings may be taken, etc. A petition was presented to the county judge, the petitioners apparently acting as principals, stating that "the undersigned, representing a majority of the tax-payers of the town of" etc., — upon which petition the court ordered the issue of the bonds. In an action to cancel the bonds, it was held that, although the petition did not follow the statute, by stating that the petitioners *are* a majority of the tax-payers, yet that was probably what it meant, and, although such proceedings, being in derogation of the common law, are to be strictly pursued,[5] yet the bonds would not, by reason of the

[1] 3 Ky. Acts 1865, Sec. 2.

[2] Jessamine *v.* Swigert, 3 S. W. Rep. 13.

[3] See 1 Dill. Mun. Corp. 4th ed., § 513, *et seq.*

[4] N. Y. Laws of 1869, chap. 907.

[5] Citing People *v.* Spencer, 55 N. Y. 1; People *v.* Smith, *Id.* 135; Wellsborough *v.* Railroad Co., 76 *Id.* 182; Craig *v.* Andes, 93 *Id.* 405.

defectiveness of the petition, be held invalid.[1] The decision cannot be sustained under the rule conceded in the opinion. Such a petition could be corruptly or evasively drawn in the language of this petition, and verified by affidavit, and presented to a county judge, and yet the petitioners would not be a majority of the tax-paying citizens of the municipality, and no one would be guilty of perjury.

§ **1133. Subscriptions by a Sovereign State.**—It is, of course, competent for a sovereign State to descend from its plane of sovereignty to enter into a contract of subscription to the capital stock of a private corporation; and this has been done by members of the American Union in many cases.[2] The obligation is of the same one-sided character as that of a subscription of an embassador, already spoken of.[3] The State can, without doubt, demand and enforce its rights as a shareholder to the fullest extent; but no rights can be enforced *against it* by the corporation, unless it gives its consent to be sued, and then only in the forum and mode embraced in that consent. Accordingly, it has been held that a bill against the State of Ohio, to compel payment of subscriptions for stock, cannot be maintained.[4] Another court held that a statute by which a State subscribed a million dollars to the stock of a bank, placed the State in the attitude of giving a *bonus* to the bank, and did not make it liable for contributions as ordinary stockholders were.[5] The extent to which a State, by becoming a stockholder in a private corporation, throws off its sovereignty, *pro hac vice*, has been a theme of nice disquisition; but it was not necessary to resort to this theory in order to vindicate the conclusion that, although the State owns all the stock in an incorporated bank, a debt due to the bank is not a debt due to the State;[6] since this would be the rule in the case of a private stockholder owning all the shares.[7]

Solon *v.* Williamsburg Saving Bank, 114 N. Y. 122; *s. c.* 39 Alb. L. J. 471; 21 N. E. Rep. 168.

[2] Baltimore &c. R. Co. *v.* Maryland, 36 Md. 519; Attorney-General *v.* Cape Fear Nav. Co., 2 Ired. Eq. (N. C.) 444.

[3] *Ante*, § 1093.

[4] Myers *v.* Zainesville &c. Turnp. Co., 11 Ohio, 273.

[5] Consolidated Bank *v.* State, 5 La. An. 44.

[6] Bank of Tennessee *v.* Dibrell, 3 Sneed (Tenn.), 379.

[7] *Ante*, § 1071.

CHAPTER XXI.

THE CONTRACT OF SUBSCRIPTION.

ARTICLE I. THEORIES AS TO THE NATURE AND FORMATION OF THE CONTRACT.

§ 1136. Relation of Stockholders to the Corporation Rests in Contract. — "The relation of stockholders to the corporation whose stock they hold is that of contract; and the rights and duties of both parties grow out of contract, implied in a subscription for stock, construed by the provisions of the charter or articles of incorporation."[1]

[1] Supply Ditch Co. *v.* Elliott, 10 Colo. 327; *s. c.* 3 Am. St. Rep. 586, 591, opinion by Macon, C.

§ 1137. Governing Statute Forms Part of the Contract. — Whether the corporation is organized under a special charter or under a general statute, the statute which authorizes its organization is deemed to enter into and form a part of it, and to furnish the rule for determining the effect of every subscription to its capital stock, as fully as though it were embodied in express terms in the subscription paper.[1] The rule is thus laid down by Selden, J., after reviewing the authorities: "Whatever may be the form or language of a subscription to the stock of an incorporated company, every person who in any manner becomes a subscriber for, or engages to take, any portion of the stock of such company, thereby assumes to pay for the same according to the conditions of the charter. * * * Whenever the subscription papers refer to the charter of the company, the provisions of such charter are virtually incorporated in the subscription and are to be referred to for the purposes of explanation."[2] "The subscription," said Gardner, J., in another case, "must be construed as if all the provisions of the statute affecting the liability of the subscriber, or his title to the stock purchased by him, were incorporated in his agreement. This has never been questioned."[3]

§ 1138. General Views as to what Constitutes One a Stockholder. — Recurring to the subject with the aid of later decisions, longer study and wider experience, the author sees no reason essentially to modify the general views advanced by him in his work on stockholders, as to what is necessary to constitute a binding contract to take shares in a joint-stock corporation. It was there stated[4] as a general rule,[5] applicable to all the charters and statutory schemes of incorporation in vogue in this country, that whoever subscribes to an unconditional agreement to take a given number of shares becomes thereby a stockholder,

[1] Hoagland *v.* Cincinnati &c. R. Co., 18 Ind. 452.

[2] Rensselaer &c. Co. *v.* Barton, 16 N. Y. 457, 460, note.

[3] Small *v.* Herkimer Man. Co., 2 N. Y. 330. A subscription good at common law is not invalidated by N. Y. Laws, 1850, ch. 140, § 4. Buffalo &c. R. Co. *v.* Gifford, 87 N. Y. 294.

[4] Thomp. Stockh., § 105.

[5] That in some States an *express promise to pay* is necessary, see *post*, § 1187.

subject to the conditions named in the subscription paper and to those imposed by the charter or by the general law.[1] The constating instrument, by which persons associate themselves together as members of a corporation or joint-stock company, is usually termed in this country the articles of association, and in England the deed of settlement. It is, therefore, but another way of expressing the foregoing rule to say that, in the absence of fraud,[2] every person who signs the articles of association or the deed of settlement, agreeing at the same time to take a certain number of shares, thereby acquires the advantages, and subjects himself to the liabilities, of a shareholder;[3] and this is more clear where the governing statute declares that those signing such articles shall be deemed a body corporate.[4] The act of subscribing for shares fixes the subscriber's liability to creditors as a shareholder, although he has not paid in any part of his subscription, or done any act whatever as such.[5] If a person orders goods to be delivered to him, a promise is implied that he will pay for them. So, if a person subscribes for shares of stock in a corporation or joint-stock company, a promise is implied that he will pay for them;[6] and the same effect is given to the acceptance and holding of a

[1] Hartford & New Haven R. Co. *v.* Kennedy, 12 Conn. 499; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466; Union Turnpike Co. *v.* Jenkins, 1 Caines, (N. Y.), 380; Goshen Turnpike Co. *v.* Hurton, 9 Johns. (N. Y.) 217; Dutchess Cotton Man. Co. *v.* Davis, 14 Johns. (N. Y.), 237; Spear *v.* Crawford, 14 Wend. (N. Y.), 20; *s. c.* 28 Am. Dec. 513; Highland Turnpike Co. *v.* McKean, 11 Johns. (N. Y.) 98; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Burr *v.* Wilcox, 22 N. Y. 551; Pickering *v.* Templeton, 2 Mo. App. 424; Beene *v.* Cahawba &c. R. Co., 3 Ala. 660; Upton *v.* Tribilcock, 91 U. S. 47; Brigham *v.* Mead, 10 Allen (Mass.), 245; Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336; Seymour *v.* Sturgess, 26 N. Y. 134; Dayton *v.* Borst, 31 N. Y. 435; Rensselaer &c. Co. *v.* Barton, 16 N. Y. 457; Lake Ontario &c. Co. *v.* Mason, 16 N. Y. 451; Hartford &c. R. Co. *v.* Croswell, 5 Hill (N. Y.), 383; Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; Kennebec &c. R. Co. *v.* Palmer, 34 Me. 366; Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465.

[2] *Post*, Ch. XXIV.

[3] Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Cole *v.* Ryan, 52 Barb. (N. Y.) 168; Sagory *v* Dubois, 3 Sandf. Ch. (N. Y.) 466.

[4] Strong *v.* Wheaton, 38 Barb. (N. Y.) 616.

[5] Spear *v.* Crawford, 14 Wend. (N. Y.) 20.

[6] Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Hartford & New Haven R. Co. *v.* Kennedy, 12 Conn. 499; Fry *v.* Lexington R. Co., 2 Metc. (Ky.) 314; Klein *v.* Alton &c. R. Co., 13 Ill. 514; Banet *v.* Alton &c. R. Co., 13 Ill. 504.

certificate of stock,[1] although, in order to constitute one a shareholder, it is not necessary that a certificate should have been issued.[2] This promise may be enforced by the corporation by *assumpsit*, or other suitable action;[3] and in case of the insolvency of the corporation, it will be enforced by a court of equity or of bankruptcy for the benefit of its creditors.[4] From the privileges and advantages flowing to the subscriber in consequence of his subscription, and from its acceptance by the other associates or by the corporation, the law implies a *consideration* sufficient to support the contract.[5]

[1] Upton *v.* Tribilcock, 91 U. S. 48; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Brigham *v.* Mead, 10 Allen (Mass.), 245. And this is so although the certificate contains a promise on the part of the corporation to pay *interest* thereon until the happening of a certain specified event. McLaughlin *v.* Detroit &c. R. Co., 8 Mich. 100. Making and mailing a certificate is regarded as the issuing of it. Jones *v.* Terre Haute &c. R. Co., 17 How. Pr. (N. Y.) 529.

[2] *Post*, § 1140; Chaffin *v.* Cummings, 37 Me. 76; Chase *v.* Merrimac Bank, 19 Pick. (Mass.) 564; Beckett *v.* Houston, 32 Ind. 393; Burr *v.* Wilcox, 22 N. Y. 551; Schaeffer *v.* Missouri Ins. Co., 46 Mo. 248. One who sells shares before the issue of the certificate, agreeing to give the buyer a certificate when he gets it, has been held not bound, as between the buyer and himself, to pay an assessment laid upon the shares subsequently to the sale, and before the issuing of the certificate. Brigham *v.* Mead, 10 Allen (Mass.), 245. Some courts have, however, held that an *express promise* to pay is necessary, — a subject hereafter considered. *Post*, § 1187, *et seq.* Interpretation and effect of peculiar contracts of subscription, prescribing unusual modes of issuing stock, terms of payment, etc.: Bailey *v.* Railroad Co., 17 Wall. (U. S.) 96; Van Alen *v.* Ill. &c. R. Co., 4 Abb. App. Dec. (N. Y.) 443; New York &c. R. Co. *v.* Van Horn, 57 N. Y. 473.

[3] Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; Beene *v.* Cahawba &c. R. Co., 3 Ala. 660; Union Turnpike Co. *v.* Jenkins, 1 Caines (N. Y.), 381; *s. c.* 1 Caines's Cas. 95; Goshen Turnpike Co. *v.* Hurtin, 9 Johns. (N. Y.) 217; Dutchess Cotton Man. Co. *v.* Davis, 14 Johns. (N. Y.) 238; Highland Turnpike Co. *v.* McKean, 11 Johns. (N. Y.) 95; Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Harlem Canal Co. *v.* Seixas, 2 Hall (N. Y.), 504; Worcester Turnpike Co. *v.* Willard, 5 Mass. 80; Delaware &c. Canal Co. *v.* Sansom, 1 Binn. (Pa.) 70; Instone *v.* Bridge Co., 2 Bibb (Ky.), 576; Tar River Navigation Co. *v.* Neal, 3 Hawks (N. C.), 520; Sanger *v.* Upton, 91 U. S. 56; Webster *v.* Upton, 91 U. S. 65; Chubb *v.* Upton, 95 U. S. 665.

[4] *Ante*, §§ 12–17; *post*, § 258 *e seq.*

[5] Union Turnpike Co. *v.* Jenkins, 1 Caines (N. Y.), 381; Goshen Turnpike Co. *v.* Hurtin, 9 Johns. (N. Y.) 217; Dutchess Cotton Man. Co. *v.* Davis, 14 Johns. (N. Y.) 238; Kennebec &c. R. Co. *v.* Palmer, 34 Me. 366. See *post*, § 1200, *et seq.*

§ 1139. Subscription Constitutes One a Member.—It has been said in a case in Maryland that "none of the cases decide that the mere fact of subscribing to the stock of an incorporated company constitutes the subscriber a stockholder, but that such subscription puts it in his power to become a stockholder by compelling the corporation to give him the legal evidence of his being a stockholder, upon his complying with the terms of the subscription." [1] The case cited in support of this doctrine [2] does not decide this proposition, but decides the reverse, namely, that a valid subscription to the stock of a corporation makes one a stockholder within the meaning of a provision of the charter making stockholders individually liable to creditors of the company in proportion to the amount of stock held, and such beyond all question is the law. [3] As we shall presently see, the courts merely divide on the question whether an *express promise to pay* in the subscription is necessary to give it this effect. [4]

§ 1140. Certificate not Necessary. — "It is not essential that a certificate should have issued, in order to create the relation of stockholder, provided a contract to take stock had been duly made, or provided the rights, privileges and emoluments of a stockholder had been enjoyed with the consent of the corporation." [5] An owner of shares may vote at corporate elections, [6] hold office, and in the character of its principal officer assent to a mortgage of its property, [7] without a certificate being issued to him. Nor is it necessary that the corporation should have issued, or even tendered to him a certificate, in order to enable it to main-

[1] Busey *v.* Hooper, 35 Md. 15; *s. c.* 6 Am. Rep. 350, 359.

[2] Spear *v.* Crawford, 14 Wend. (N. Y.) 24; *s. c.* 28 Am. Dec. 513.

[3] Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Cole *v.* Ryan, 52 Barb. (N. Y.) 168; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466; Chaffin *v.* Cummings, 37 Me. 76; Chase *v.* Merrimac Bank, 19 Pick. (Mass.) 564; Beckett *v.* Houston, 32 Ind. 393; Burr *v.* Wilcox, 22 N. Y. 551; Schaeffer *v.* Missouri Ins. Co., 46 Mo. 248.

[4] *Post*, § 1187, *et seq.*

[5] Butler University *v.* Scoonover, 114 Ind. 381; *s. c.* 5 Am. St. Rep. 627; Farrar *v.* Walker, 3 Dill. (U. S.) 506; Chaffin *v.* Cummings, 37 Me. 76; Angell & Ames on Corp., § 565; Chase *v.* Merrimac Bank, 19 Pick. (Mass.) 564. It follows that it is not necessary that the fact should appear on the books of the corporation. It may be proved by parol. Chaffin *v.* Cummings, *supra.*

[6] Beckett *v.* Houston, 32 Ind. 393.

[7] McComb *v.* Barcelona Apartment Asso., 31 N. Y. St. Rep. 325; McComb *v.* Cordova Apartment Asso. (Sup. Ct.) *Id.* 334.

tain an action against him for assessments upon his shares.[1] And for equal reasons a certificate is not necessary to make him liable to *creditors* for debts of the corporation.[2] The theory is that it is the act of subscribing, or the registry of the shareholder's name upon the stock book of the company opposite the number of shares for which he has subscribed, which gives him his title thereto, and that the certificate neither constitutes his title nor is necessary to it, but is only a *memorial* or *evidence* of it, which he is entitled to demand from the corporation whenever he may desire it.[3] It is further reasoned that a subscription for stock does not stand on the same footing as a contract of *sale*, so that the company, like the vendor, must offer to deliver before demanding the price. Whenever the subscriber *pays*, he is the owner of stock in the company. It is the *payment* that makes him stockholder, with all the rights of one, if the certificate were not issued at all.[4]

§ 1141. Circumstances under which Necessary. — The rule of the preceding section may, of course, be dispensed with by

[1] Chester Glass Co. *v.* Dewey, 16 Mass. 94; *s. c.* 8 Am. Dec. 128; Shelbyville *v.* Shelbyville & Co., 1 Metc. (Ky.) 54; Vawter *v.* Ohio &c. R. Co., 14 Ind. 174; Hardy *v.* Merriweather, 14 Ind. 203; Fulgam *v.* Macon &c. R. Co., 44 Ga. 597; South Georgia &c. R. Co. *v.* Ayres, 56 Ga. 230; New Albany &c. R. Co. *v.* McCormick, 10 Ind. 499; *s. c.* 71 Am. Dec. 337; Heaston *v.* Cincinnati &c. R. Co., 16 Ind. 275; *s. c.* 79 Am. Dec. 430. See also Mitchell *v.* Beckman, 64 Cal. 117; Schaeffer *v.* Missouri Ins. Co., 46 Mo. 248, 250; Burr *v.* Wilcox, 22 N. Y. 551; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 58. Slipher *v.* Earhart, 83 Ind. 179.

[2] Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Haynes *v.* Brown, 36 N. H. 545, 563; Chesley *v.* Pierce, 32 N. H. 402; Chaffin *v.* Cummings, 37 Me. 76, 83; Chester Glass Co. *v.* Dewey, 16 Mass. 94; *s. c.* 8 Am. Dec. 128; Chase *v.* Merrimac Bank, 19 Pick. (Mass.) 574; Burr *v.* Wilcox, 22 N. Y. 521; *s. c.* affd. 6 Bosw. (N. Y.) 198; Schaeffer *v.* Missouri Ins. Co., 46 Mo. 248; Hawley *v.* Upton, 102 U. S. 314; Upton *v.* Tribilcock, 91 U. S. 45; Webster *v.* Upton, *Id* 65.

[3] Cincinnati &c. R. Co. *v.* Pearce, 28 Ind. 508; Lincoln *v.* State, 36 Ind. 163; Beaver *v.* Hartsville University, 34 Ind. 248; New Albany &c. R. Co. *v.* McCormick, 10 Ind. 499; *s. c.* 71 Am. Dec. 337. And see Chandler *v.* Northern Cross R. Co., 18 Ill. 190. For the same reason the failure of the corporation to issue to the defendant, who is a stockholder therein, certificates for his shares, is no defense by him when sued by the corporation for money loaned. Hazelett *v.* Butler University, 84 Ind. 230.

[4] Fulgam *v.* Macon &c. R. Co., 44 Ga. 597.

the terms of the *contract*. Thus, a tender of a certificate is necessary before the corporation can sue on the contract of subscription, where the payment is made, by the terms of the contract, *conditional* upon the delivery of the certificate.[1] So, *preferred stock*, being something more than a mere evidence of a stockholder's right to participate in the management of the affairs of the company and to receive dividends, but being in the nature of an interest-bearing security,[2] it has been held that the implied promise of the company to issue such stock and of the subscriber to pay for it, where the subscription is to stock of this kind, are *concurrent* and *dependent*, and that an action by the company upon such a subscription can not be maintained until it has issued or tendered the stock.[3] On the other hand, except in the case of preferred stock, the company can maintain an action without a delivery or tender of the stock, where it seeks merely to recover an installment or assessment, and not the whole price.[4]

§ 1142. Contract of Subscription when not Necessary. — It is not necessary, in order to fix a person with the full liability of a stockholder to creditors of the corporation, that he should have signed a contract of subscription to the corporate stock. The mere *acceptance of shares* of the stock by him will have this effect.[5]

§ 1143. If no Certificate Issued, Written Agreement Necessary. — On the other hand, if no certificate of stock has been issued to and accepted by the person sought to be charged, a written contract of subscription is ordinarily necessary to bind him as a shareholder.[6]

§ 1144. View that Contract of Subscription Necessary in Some Form. — In an action upon a bond for $200 given to a corpora-

[1] Courtright *v.* Deeds, 37 Ia. 503.

[2] *Post*, § 2262.

[3] St. Paul &c. R. Co. *v.* Robbins, 23 Minn. 439.

[4] Minneapolis Harvester Works *v.* Libby, 24 Minn. 327.

[5] Nulton *v.* Clayton, 54 Ia. 425; Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Hartford &c. R. Co. *v.* Kennedy, 12 Conn. 499; Rensselaer &c. R. Co. *v.* Barton 16 N. Y. 457; Dayton *v.* Borst, 31 N. Y. 435; Jackson *v.* Traer, 64 Ia. 469; *s. c.* 52 Am. Rep. 449.

[6] Pittsburgh &c. R. Co. *v.* Clarke, 29 Pa. St. 146.

tion, it was alleged that it was given as security for $200 of the stock of the corporation, which the defendant had subscribed for and which had been retained by him as a loan under the charter. The jury returned a special finding that the defendant "at no time before or after the execution of said bond subscribed for any stock," etc. It was held, in substance, that the conclusion of law upon this finding was that the defendant was not liable on the bond. Mitchell, C. J., said: "Never having subscribed for any stock, there was, of course, no consideration for the bond, unless in some way he received stock, or acted or was recognized as a stockholder. The jury expressly negative each and all of these propositions. They return that the defendant never has subscribed for nor received, owned, or in any manner controlled any stock, and that he received no consideration whatever for the bond. * * * It does not appear, in the case before us, that there was even an oral agreement to subscribe for stock. The recitals in the bond, and the whole case, assume that Scoonover had subscribed for stock, and that the subscription price was the consideration of his contract to pay. When, therefore, it appeared that he never had subscribed for stock, nor in any other manner acquired any right to be recognized as a stockholder, in the event of payment of the bond, it became entirely clear that his contract was without consideration. Although it may be true that a binding contract of subscription to the stock of a corporation, unless the statute or articles of association provide to the contrary, may be made, without actually signing a formal subscription paper or stock book, in any manner that the subscriber and corporation clearly manifest their purpose to enter into a contract whereby the relation of stockholder of the corporate stock is to result,—yet there must, in every case, be some sort of subscription or contract, whereby the subscriber obtains the right, upon some condition, to dedemand stock, and to exercise the rights of a stockholder."[1]

§ **1145. Such Contract not Created by Recitals in a Bond.**—In the bond which was sued on in this case it was recited that the principal obligor "has retained of his subscription for two shares of capital stock * * * the sum of two hundred dollars, being the amount of his subscription, as a loan." It was held that this recital did not estop him from showing that, in point of fact, he had never subscribed to the shares of the corporation. The court said: "While this recital might well have been regarded, in the absence of countervailing evidence, as sufficient proof that a subscription of some kind had been made, it was

[1] Butler University *v.* Scoonover, 114 Ind. 381; *s. c.* 5 Am. St. Rep. 627.

not, without more, conclusive, either upon the corporation or Scoonover, that he was a stockholder. The recital was in no sense contractual, but was a mere statement of the consideration of the bond, and was in no sense different in effect than would be a recital in a promissory note or other contract for the payment of money, concerning the consideration upon which it was executed. Whether one who subscribes for stock in a corporation becomes, by the mere fact of making the subscription, a stockholder therein, depends upon the terms of his contract and the charter of the corporation, and whether the subscription was made as a preliminary to the organization, or after it was under way, for stock thereafter to be issued."[1]

§ 1146. View that a Contract of Subscription must be in Writing. — The word "subscription" by its etymology imports a *writing;* and most of the courts take the view that a contract to become a shareholder in a corporation must be in writing and cannot be established by parol evidence.[2] In conformity to the same view, it has been held that the title of a transferee of stock can only be established by evidence of the same dignity.[3] This view no doubt had its origin in the fact that nearly all special charters and general statutes establishing schemes of corporate organization provide for the receiving of *subscriptions* to the capital stock, either in books open for that purpose, or upon the articles of association by which the corporation is established, or otherwise.[4] The conception seems, therefore, to have been of statutory creation; but as it conforms to the common understanding and to the habits of business, it seems to have been adopted as a general rule without reference to the terms of the particular charter or statute.

[1] Butler University *v.* Scoonover, 114 Ind. 381; *s. c.* 5 Am. St. Rep. 627; opinion by Mitchell, C. J.

[2] Pittsburgh &c. R. Co. *v.* Gazzam, 32 Pa St. 340; Vreeland *v.* New Jersey Stone Co., 20 N. J. Eq. 188, 191; Thames Tunnel Co. *v.* Sheldon, 6 Barn. & C. 341; Pittsburgh &c. R. Co. *v.* Clarke, 29 Pa. St. 146, 152; Fanning *v.* Insurance Co., 39 Oh. St. 339; *s. c.* 41 Am. Rep. 517.

[3] Pittsburgh &c. R. Co. *v.* Clarke, 29 Pa. St. 146, 152; Brouwer *v.* Appelby, 1 Sandf. S. C. (N. Y.) 170.

[4] Thus, under a statute of Oregon (Or. St. 525, Secs. 4–7), defining the duties of directors and the rights of stockholders, it is held that all original stockholders are only made liable on their subscriptions for stock by a *writing*, and are all equal before the law, and there is no estoppel between them. Coyote Gold &c. Co. *v.* Ruble, 8 Or. 284.

§ 1147. A Writing not in Strictness Necessary. — But we have already seen that shares of corporate stock are not goods, wares and merchandise, within the meaning of the seventeenth section of the English statute of frauds.[1] A contract to take and pay for shares in a corporation is hence not a contract for the *purchase* of goods, wares and merchandise within the meaning of that statute. And it would seem to follow that, in strictness of law, it is neither necessary that there should be a contract in writing to take and pay for shares, nor an actual *receipt* of them — or what is tantamount, a receipt of their symbol, the stock certificate — in order to constitute one a shareholder. It has accordingly been held that a person may become a shareholder without signing the stock book or any written agreement to take shares;[2] and that a *parol* agreement made with the directors of a corporation to take stock may be enforced, when neither the governing statute nor the charter requires such contracts to be in writing.[3] Again, it has been observed in a case in Canada, by Osler, J.: "A person may make himself liable to be treated as a shareholder in many other ways than by subscribing for shares and obtaining a formal allotment; and one who caused his name to be entered on the company's books as a shareholder in respect of shares taken for the purpose of making up the statutory amount would, on principle, clearly be estopped from afterwards saying that he was not the holder of such shares."[4]

§ 1148. Oral Promise to Subscribe for Shares and Note Given Therefor. — One American court has gone so far in this direction as to hold that an oral promise, pending the organization of a corporation, to take shares of the stock, does not constitute the promisor a stockholder or member, and will not furnish a *consideration* to support a note given by him to pay for such shares. The court say: "The note was a promise to pay for stock which the maker had verbally agreed to take. Had Mrs. Fanning been a subscriber to the stock she would have been entitled to be treated as a stockholder. This would

[1] *Ante*, § 1068.

[2] *Re* Central Bank of Canada, 25 Can. L. J. 238; Caston's case, 12 App. (Can.) 486.

[3] Colfax Hotel Co. *v.* Lyon, 69 Iowa, 683; *s. c.* 29 N. W. Rep. 780.

[4] Union Fire Ins. Co. *v.* O'Gara, 4 Ont. (Can.) 369.

have been a sufficient consideration to have supported a promise, either *express* or *implied*, to pay for the stock. The agreement must be mutual and binding upon both parties. If the corporation are not bound to treat her as a stockholder, her promise to pay is a *nudum pactum*, for want of a mutual promise by the corporation to award her the stock. In the absence of proof that she had received the stock, or of any other consideration to support her promise, or of any acts by her, creating an estoppel, her promise to pay for stock for which she has not subscribed, and which the corporation is not bound to deliver at the proper time, is without sufficient consideration to support it."[1] Another American court has held that where A gives his promissory note to a corporation and receives a receipt for the same, which also states that the note when paid will be in full for a certain number of shares of the capital stock, A does not become a stockholder until the note matures and is paid, and a stock certificate is issued.[2] We may take leave to doubt the soundness of both of these decisions. A promissory note given upon parol agreement to deliver goods, wares and merchandise (invalid under the statute of frauds) is undoubtedly supported by a good consideration; and the receipt mentioned in the second case would take the transaction, if it related to the sale of goods, out of the statute, for both the note and the receipt would be read together as one paper.

§ **1149. Subscription Not Varied by Parol Evidence.** — The general rule which excludes parol evidence to vary writings, applies to subscriptions to the capital stock of corporations. Such a subscription cannot, therefore, be varied by parol evidence of a special agreement made prior to or concurrently with it,[3] —

[1] Fanning *v.* Insurance Co., 37 Oh. St. 339; *s. c.* 41 Am. Rep. 517, 518.

[2] Tracy *v.* Yates, 13 Barb. (N. Y.) 152.

[3] Smith *v.* Tallassee &c. Plank Road Co., 30 Ala. 650; Ridgefield &c. R. Co. *v.* Brush, 43 Conn. 86; Martin *v.* Pensacola &c. R. Co., 8 Fla. 370; *s. c.* 73 Am. Dec. 713; New Albany &c. R. Co. *v.* Fields, 10 Ind. 187; Evansville &c. R. Co. *v* Posey, 12 *Id.* 363; Thigpen *v.* Mississippi &c. R. Co., 32 Miss. 347; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; McClure *v.* People's Freight R. Co., 90 Pa. St. 269; Cunningham *v.* Edgefield R. Co., 2 Head (Tenn.), 23; East Tennessee &c. R. Co. *v.* Gammon, 5 Sneed (Tenn.), 567.

as to show that the subscription was made upon a *condition* not expressed in the instrument.[1]

§ 1150. When Explainable by Parol.—No reason is perceived why the rule which lets in parol evidence to explain *ambiguities* in written contracts should not apply to contracts of this kind; and there are decisions which support this view.[2] It has been held that the acts of corporations may be proved in the same manner as acts of individuals; and that, if there be no record evidence of their acts, they may be proved by parol. Accordingly, it has been held that, in a suit on a subscription to the stock of an incorporated company, it was competent for the defendant to show by oral testimony, in the absence of record evidence, that the subscription list, upon which the defendant's name appeared, was *annulled and abandoned*, and that another subscription was subsequently opened and made the basis of the organization by the stockholders.[3]

§ 1151. Form of the Subscription.—It seems that the form of the subscription is immaterial so that the intention of the parties can be collected from the writing,[4] unless the charter or governing statute requires it to be made in a particular form or manner, in which case, according to one view, the requirement of the statute must be pursued or the subscription will not be binding.[5] Unsubstantial variances from the form prescribed by the statute will not, however, prevent the subscription from being

[1] Fairfield County Turnp. Co. *v.* Thorp, 13 Conn. 173; Wight *v.* Shelby R. Co., 16 B. Monr. (Ky.) 4; *s. c.* 63 Am. Dec. 522; Kennebec &c. R. Co. *v.* Waters, 34 Me. 369; North Carolina R. Co. *v.* Leach, 4 Jones L. (N. C.) 340; Miller *v.* Hanover &c. R. Co., 87 Pa. St. 95; *s. c.* 30 Am. Rep. 349. As to subscriptions made upon parol *conditions*, see *post*, § 1311, 1401, *et seq.*

[2] Johnson *v.* Wabash &c. Plank Road Co., 16 Ind. 389; Sodus Bay &c. R. Co. *v.* Hamlin, 24 Hun (N. Y.), 390.

[3] Southern Hotel Co. *v.* Newman, 30 Mo. 118.

[4] 1 Mor. Priv. Corp., 2d ed., § 69; Nulton *v.* Clayton, 54 Ia. 425; *s. c.* 37 Am. Rep. 213; Monterey &c. R. Co. *v.* Hildreth, 53 Cal. 123; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294.

[5] Shurtz *v.* Schoolcraft &c. R. Co., 9 Mich. 269; Carlisle *v.* Saginaw &c. R. Co., 27 Mich. 315; Parker *v.* Northern Central &c. R. Co., 33 Mich. 23; Northern Central &c. R. Co. *v.* Eslow, 40 Mich. 422.

operative. Thus where the legislature provided that the form of the subscription should be payable to the "president, managers, and company," the contract was held valid although the word "president" was omitted and it was made payable to the managers and company. The court found enough in the other expressions of the instrument to describe the corporation intended and to effectuate the contract.[1]

§ 1152. In what Kind of Book — on what Kind of Paper. — Unless the charter or governing statute so provides, it is not necessary to the validity of the subscription that it should be originally made in a book prepared for that purpose. And although the statute requires books to be opened, the use of subscription papers in the first instance instead of a book does not make the subscription void.[2] Subscriptions made on a loose sheet of paper, which was afterwards put in a bound book used as a record of the company, were held sufficient, where the contents of this paper, with the names of the subscribers and the amounts subscribed, were entered in the book by the commissioners who were appointed to open books of subscription.[3] Where the subscription was made in a small blank book before the regular stock book for subscriptions was opened, and was afterwards accepted by the corporation, it was regarded as unnecessary, in order to a right of action for assessments, that it should be transferred to the stock book of the company.[4]

§ 1153. Signing in Blank. — A signature to an incomplete paper, wanting in any substantial particular, will not be binding upon the signer without further assent on his part to the completion of the instrument.[5] When, therefore, a person subscribed to articles of association for the purpose of organizing a railroad corporation under the General Railroad Act of New York

[1] Hagerstown Turnp. Co. *v.* Creeger, 5 Harr. & J. (Md.) 122; *s. c.* 9 Am. Dec. 495.

[2] Hamilton &c. Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157; Ashtabula &c. R. Co. *v.* Smith, 15 Oh. St. 328; Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146; Brownlee *v.* Ohio &c R. Co., 18 Ind. 68; Mobile & Ohio R. Co. *v.* Yandal, 5 Sneed (Tenn.), 294.

[3] Woodruff *v.* McDonald, 33 Ark. 97.

[4] Brownlee *v.* Ohio &c R. Co., 18 Ind. 68.

[5] See, however, note, 13 Am. Dec. 669.

of 1850,[1] and, at the time of so signing, the names of the directors were left in blank, — it was held that the instrument was incomplete and inoperative as against him; that there was no implied consent on his part to the insertion of the names of any persons as directors; and that, by the insertion of such names without his consent, the instrument was not made binding upon him.[2] But where certain persons signed the subscription book of a corporation, leaving the amounts in blank, intending that they should be represented as subscribers for the purpose of influencing others to subscribe, — it was held, in an action by the creditors of the corporation, seeking to compel payment of unpaid subscriptions, — that the signers impliedly authorized the filling up of the blanks by thus taking subscriptions.[3]

§ **1154. Effect of Erasures.** — The erasure of a subscription for stock does not *per se* prevent suit upon it, but explanatory parol evidence is admissible.[4]

§ **1155. Explanatory Memorandum Annexed.** — Where an explanatory memorandum is annexed to the subscription paper, the legal presumption is that it was there when the subscription was made, in the absence of evidence to the contrary.[5]

§ **1156. Receipt on Margin of Subscription Book.** — A mere receipt for a certificate of stock written in the margin of the subscription book has been held a sufficient subscription for stock.[6]

§ **1157. Rule which Requires a Subscription to the Articles of Association.** — Where corporations are organized under general laws, by preparing and filing in the general office of the secretary of state, or some other public office, articles of association signed by the co-adventurers, there is more reason for holding that a valid subscription can only be made beneath

[1] N. Y. Laws, 1850, ch. 140.

[2] Dutchess &c. R. Co. *v.* Mabbett, 58 N. Y. 397.

[3] Jewell *v.* Rock River Paper Co., 101 Ill. 57.

[4] Bordentown &c. *v.* Imlay, 44 N. J. L. 285.

[5] Robinson *v.* Pittsburgh &c. R. Co. 32 Pa. St. 334; *s. c.* 72 Am. Dec. 792.

[6] Lohman *v.* N. Y. and Erie R. Co., 2 Sandf. (N. Y.) 39. See also Carrick's case, 1 Sim. (N. S.) 505; Clements *v.* Todd, 1 Exch. 268.

such articles of association. Under such schemes of corporate organization, several courts have held that signing a provisional subscription paper, before or without a formal execution and signing of the articles of association, does not make the signer a stockholder and as such liable to assessments.[1] Under this theory the liability of stockholders at the date of filing articles is limited to those named therein, and the amounts therein mentioned.[2] It is said that, to perfect such a subscription so as to render the subscriber liable, he must subsequently sign the articles of association, or subscribe, in the *books* of the company, to the capital stock.[3] This rule seems to have especial force where the preliminary paper binds the subscribers to take the number of shares set opposite their respective names, *on conditions*. The annexing of the conditions is regarded as placing the instrument in the category of mere tentative or provisional undertakings.[4]

§ **1158. Reasons which Support this Rule.** — The theory upon which the Supreme Court of Missouri proceeds in reaching this conclusion is that the statute furnishes the rule of decision to the exclusion of the rules of the common law, and that the statute decides the question by providing, after certain preliminary matters, that "thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in said company, shall be a corporation," etc.[5] In reaching the above conclusion, Mr. Commissioner Martin, writing the opinion of the court, said: "I am unable to perceive how any persons of the requisite number, desirous of forming a railway company under the provisions of this statute,

[1] Coppage *v.* Hutton 124 Ind. 410; *s. c.* 7 L. R. A. 591; 24 N. E. Rep. 112 (under Rev. Stat. Ind., § 3851).

[2] Monterey &c. R. Co. *v.* Hildreth, 53 Cal. 123; Sedalia &c. R. Co. *v.* Wilkerson, 83 Mo. 235; Troy &c. R. Co. *v.* Tibbitts, 18 Barb. (N. Y.) 298; Troy &c R. Co. *v.* Warren, *Id.* 310.

[3] Troy &c. R. Co. *v.* Tibbitts, *supra;* Troy &c. R. Co. *v.* Warren, *supra;* Sedalia &c. R. Co. *v.* Wilkerson, *supra.*

[4] Troy &c. R. Co. *v.* Tibbitts, 18 Barb. (N. Y.) 298; Troy &c. R. Co. *v.* Warren, *Id.* 310; Chase *v.* Sycamore &c. R. Co., 38 Ill. 215; Thrasher *v.* Pike, 25 Ill. 393. Where three existing railroad companies were *consolidated,* and a subscription was made after the agreement for consolidation, but before it was filed in the office of the secretary of the commonwealth, it was held that the filing of the agreement in the office of the secretary was not necessary to validate the subscription. McClure *v.* People's Freight Ry. Co., 90 Pa. St. 269.

[5] R. S. Mo. 1879, § 764.

can do so in any other mode than the one pointed out in it. In no other mode can the relation of stockholder and corporation, under this statute, be established. The statute neither contemplates nor alludes to any preliminary paper of subscription such as the one given in evidence. The fact that informal papers and circular letters are commonly signed and published as a part of the enterprise and zeal which give birth to such corporations, can make no difference, as long as the statute fails to recognize them as among the necessary and prescribed legal steps to be taken by the incorporators to create the body corporate. The allusion in the statute to 'all persons who shall become stockholders in said company,' evidently refers to such as become stockholders by subscribing for stock *after* the corporation is established, in *subscription books* opened by the directors, according to the provisions of Section 711, Revised Statutes."[1]

§ 1159. Consequence of this Rule: No Contract if Subscriber dies before Corporation Formed. — One of the consequences of the foregoing doctrine is that if the subscriber *dies* before signing the formal articles of association, the liability of a shareholder cannot be enforced against his personal representative.[2] On still plainer grounds it has been held that an engagement to subscribe for the benefit of an association, which is not a joint-stock company, but which needs money to carry out its objects, as for instance, a religious society, for the building of

[1] Sedalia &c. R. Co. *v.* Wilkerson, 83 Mo. 235, 242; citing and following Troy &c. R. Co. *v.* Tibbitts, 18 Barb. (N. Y.) 297; Poughkeepsie &c. Plank Road Co. *v.* Griffin, 24 N. Y. 150; and distinguishing Peninsular R. Co. *v.* Duncan, 28 Mich. 130; — also distinguishing the following cases as being cases "in which the act of incorporation, either general or special, had been passed, and the defendants were held liable as stockholders by reason of subscriptions within the peculiar meaning and terms of the acts; or because the acts, unlike the one before us, failed to prescribe any particular method of subscription by which a person might acquire the rights and be subject to the responsibilities of a stockholder:" Tonica &c. R. Co. *v.* McNeely, 21 Ill. 71; Johnson *v.* Ewing, Female University, 35 Ill. 518; Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336; Hartford &c. R. Co. *v.* Kennedy, 12 Conn. 500; Taggart *v.* Western Maryland R. Co., 24 Md. 663; Penobscot R. Co. *v.* Dummer, 40 Me. 172; *s. c.* 63 Am. Dec. 654; Kennebec &c. R. Co. *v.* Palmer, 34 Me. 366; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Athol Music Hall Co. *v.* Cary, 115 Mass. 471.

[2] Sedalia &c. R. Co. *v.* Wilkerson, 83 Mo. 235.

a church, — is necessarily a mere proposal, and is therefore revocable until the association is formed. Until then, there is no one to accept the proposal, and consequently if the subscriber dies before organization, the proposal is necessarily withdrawn by his death, and does not ripen into a contract; since there can be no contract without the correlative parties, and there must be something to support a promise.[1] But it is said that, if the association is formed and the object for which the money was subscribed is entered upon during the life-time of the subscriber, *e. g.*, if the building of the church is begun, — and with his express or implied consent, he, and of course his legal representatives, will be bound to pay the subscription.[2]

§ **1160. Other Consequences of this Rule.** — Another consequence of this rule, and one which results in conformity with a principle stated in a preceding section,[3] is that a subscriber to the provisional paper is not bound by it where it is annexed to the articles of association without his consent.[4] In the same line of thought it has been held that agreements made by persons who contemplate becoming stockholders in a corporation thereafter to be organized, which agreements are not intended as subscriptions to its stock, although they relate to its future management, do not give the secretary of the corporation, when formed, authority to place the names of such subscribers on the list of stockholders in the stock book.[5] Another consequence of the same rule is that, where there is no statute requiring or authorizing such a provisional subscription to be made, distinct from the articles of association which are required to be executed and filed with the secretary of state, — a copy of such provisional subscription paper, certified by the secretary of state, will not be admissible in evidence.[6]

§ **1161. Doctrine that Subscriptions not Binding unless Regularly Made.** — It seems to be merely another way of stat-

1 Phipps *v.* Jones, 20 Pa. St. 260. But see *post*, § 1170.

2 *Ibid.*

3 *Ante*, § 1153.

4 Bucher *v.* Dillsburg &c. R. Co., 76 Pa. St. 306.

5 Coyote Gold &c. Co. *v.* Ruble, 8 Or. 284.

6 Troy &c. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 681.

ing the theory of the foregoing cases to say, as some of the courts do, that a stock subscription is not binding unless regularly made in the statutory mode. The subscribers are bound to take notice of the terms of the charter, where there is one in existence, and of the governing statute where the corporation is organized under a general law.[1] The charter or governing statute is deemed to enter into and to form a part of the contract of subscription; but, on this theory, only when the subscription is made in conformity with its terms. Such subscriptions, it is reasoned, are only binding on the subscribers when they are so made as to bind the company; and as the statute creates no obligation on the corporation, except upon subscriptions regularly made, no others can be enforced, unless they were made upon some actual consideration or agreement binding the company.[2] In conformity with this theory, it has been ruled, under a statute of incorporation which declares that the persons subscribing the original articles, and those who subscribe to the stock in the manner to be provided by the *by-laws*, shall be a body corporate;[3] that there can be no operative subscription to the stock, outside of subscriptions to the articles, until by-laws directing the mode of subscribing have been framed; and that a subscription before the adoption of by-laws, does not create either the rights or liabilities of membership.[4] In like manner it has been held that there can be no recovery upon a subscription to the capital stock of a street railroad company, made before its organization, where it is not shown that the defendant, after the subscription of the requisite amount of stock, subscribed articles of association which set forth, besides other requisites, the *number of directors* and their *names*, as required by the applicatory statute, and where it does not appear that he ever assented to the number or names of the directors.[5]

§ 1162. View that a Subscription to the Shares of a Corporation not Formed Creates no Liability.— The rule which requires a strict compliance with the statute in the mode of

[1] *Ante*, § 1137.

[2] Parker *v.* Northern Cent. Mich. R. Co., 33 Mich. 23.

[3] Mich. Comp. L., 1871, § 2405.

[4] Carlisle *v.* Saginaw Valley &c. R. Co., 27 Mich. 315.

[5] Reed *v.* Richmond Street R. Co., 50 Ind. 342.

making the subscription is entirely compatible with the rule hereafter stated[1] that a subscription is valid although it be an agreement to take shares of the capital stock of a corporation to be thereafter created. It has been already seen that where corporations are organized under general laws, the existence of the corporation generally dates from the filing of the articles of association, certificate of incorporation, or other statutory paper, by whatever name called, in the office of the secretary of state, or in some other public office, for record.[2] Now, if it were the rule that the subscription does not become obligatory, unless the other contracting party — namely, the corporation,— is in existence at the time the subscription is made, the subscription of none of the original corporators would be binding, but any of them could retreat from their obligation even after the corporation should come into existence in part by his voluntary act. We should then have the anomalous condition of a corporation being created by the engagements of a number of co-adventurers, not one of which is binding. We should have the still more anomalous spectacle of a joint-stock company having no capital except such as depended on the mere moral obligation of its creators,— unless such part payment[3] as they may have been required to make under the governing statute should render their subscriptions binding. But, as will be subsequently shown,[4] these part payments are often either not made at all, or else made by giving promissory notes or bank checks, which are not paid, the articles or certificate falsely stating that they have been made. So that, if the view on which we are commenting is a sound one, we should have in many cases the solecism of joint-stock corporations without any stockholders and without any capital stock, other than a potential stock depending on the future voluntary action of the co-adventurers or of others who might conclude to come into the venture. Of course, the legislatures enacting these schemes of corporate organization did not contemplate results so absurd and so obviously opposed to public policy. Any view which ascribes such a meaning to such a statute is scarcely worthy of

[1] *Ante*, § 1158.

[2] *Ante*, § 217, *et seq.*

[3] As to which see *post*, § 1168.

[4] *Post*, § 1218, *et seq.*

discussion; and yet, as will now be shown, such a view has been taken by an authoritative court in an opinion delivered by an eminent judge.

§ **1163. Further of this View: Reasoning of Chief Justice Black.** — The view just stated has been taken in *Pennsylvania.* It is seemingly limited to that State, and is doubted and departed from in other decisions in that State. Briefly stated, it is, that one who signs a subscription paper, but nothing more, whereby he agrees to take a certain number of shares in a corporation thereafter to be formed, does not become liable as a shareholder, in an action for assessments by the corporation after it is formed.[1] The reasoning of the court in the leading case where this doctrine was started is more impulsive than sound. The opinion was given by Jeremiah Black, C. J., who said: "A contract cannot be made by one person alone. It takes two to make a bargain. Before a promise becomes a binding obligation, it must not only be made to, but must be expressly or impliedly accepted by, the party for whose benefit it was meant. The paper before us is no more than a naked expression of the subscriber's intention to purchase certain shares in the capital stock of a company which it was expected would be incorporated by the legislature. Besides, it is without any sufficient consideration. It is not pretended, and cannot be made out from the paper, that the agreement of the defendant was the motive of the others for taking stock. It is well settled, that procuring legislation of any

[1] Strasburg R. Co. *v.* Echternacht, 21 Pa. St. 220; *s. c.* 60 Am. Dec. 49; Hedge *v.* Horn's Appeal, 63 Pa. St. 279; McClure *v.* People's Freight Co., 90 Pa. St. 271. The same view was taken by Mr. Justice Campbell in his dissenting opinion in Peninsular R. Co. *v.* Duncan, 28 Mich. 152. The tendency of the courts in Pennsylvania to depart from this holding is illustrated by Shober *v.* Lancaster Park Asso., 68 Pa. St. 431, where it was held that a subscription which positively promises to pay a certain sum of money to accomplish a specified object is binding. This case followed the decision in Edinboro Academy *v.* Robinson, 37 Pa. St. 210; *s. c.* 78 Am. Dec. 421, where an action at law for an assessment was sustained after the incorporation of the company on a subscription made before its incorporation. In Steamship Co. *v.* Murphy, 6 Phila. (Pa.) 224, Sharswood, P. J., regarded the case of Strasburg R. Co. *v.* Echternacht, *supra,* where this doctrine was sprung, as being overruled in Edinboro Academy *v.* Robinson, *supra,* except in so far as it denied relief in equity.

kind is not a consideration which will support even a direct promise to pay a fair compensation for the labor of the promisee about such a business. Again: if there was a binding engagement, it was not made with the railroad company, which did not exist at the time." [1]

§ 1164. Distinction between a Subscription and an Agreement to Subscribe. — This discussion conducts us to a distinction, taken in some of the cases, between a contract of subscription and an agreement to subscribe. The theory of these cases seems to be that if a number of co-adventurers mutually agree to subscribe for shares in a corporation thereafter to be formed, this does not amount to an irrevocable contract to become shareholders when the corporation is formed; but they must perform the additional act of executing the statutory contract of membership by signing and acknowledging the articles of association where the corporation is unformed, or by entering their names on its stock book where it is formed. This theory is much like that already considered,[2] that until this additional act is performed there is no offer which the corporation, when formed, or even if already formed, can accept, and that the subscribers do not therefore become shareholders and liable to be charged as such, unless they choose to carry out their agreement by subscribing for the shares.[3]

§ 1165. Infirmity of this Distinction. — While this view is not inherently absurd, as is another view hereafter considered,[4] yet it carries with it an infirmity which in conscience and morals is scarcely less serious. It permits any one of the co-adventurers to retreat from his solemn obligation after the others have acted upon the faith of it by organizing the corporation. The same

1 Strasburg R. Co. *v.* Echternacht, 21 Pa. St. 220; *s. c.* 60 Am. Dec. 49. This case is referred to in Talcott *v.* Pine Grove, 1 Flippin (U. S.), 49, on the proposition that the promoters and launchers of a corporation cannot bind it in any way, although all are shareholders.

2 *Ante*, § 1157.

3 See Mor. Priv. Corp. 2nd ed., § 49; Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219; Thrasher *v.* Pike County R. Co., 25 Ill. 393. Compare Quick *v.* Lemon, 105 Ill. 578, 585; Mt. Sterling Coal Road Co. *v.* Little, 14 Bush (Ky.), 429.

4 *Post*, § 1188.

view, applied to the analogy of a contract of sale, would deprive the vendee of any remedy in the case of an executory contract to sell, or to manufacture and sell. It presents a striking instance of the manner in which lawyers and judges frequently reason, stumbling upon technical refinements and sinking justice entirely out of view. The true view is: 1. That the co-adventurers who sign such a contract obligate themselves to each other, and that the promise of each is a consideration for the promise of the others.[1] 2. That the subscription is in the nature of a standing and continuing proposal to the corporation which is contemplated by the parties, and that when the corporation is called into existence and accepts the proposal, the minds of the contracting parties meet and the contract is obligatory. It is mere casuistry to say that the contract can never become obligatory because there are not at the time it is made two contracting parties.

§ 1166. Unsoundness of the View that the Proposal is Bad Unless Made in Strict Compliance with the Statute. — Equally unsound is the view that the proposal of the subscriber is bad unless made in strict compliance with the governing statute. It in no sense resembles the case of a defective execution of a statutory power, which will not be aided even in equity.[2] It is in no sense like the case where a statute creates a right and gives a remedy for the assertion of the right, — in which case it is well known the statutory remedy is exclusive.[3] It is not even remotely analogous to the case where a court of justice proceeds under a statute which is in derogation of the common law, in which case it must not only proceed strictly, but must show affirmatively by its record that it has kept within its jurisdiction.[4] It is the naked case of a man capable of making and taking contracts, making a proposal for a contract which is not only not

[1] *Post*, § 1205.

[2] For instance, that equity will not aid defective conveyances by *married women*, see 19 Am. Dec. 230.

[3] Uncertainty, in relation to an *immaterial matter*, in the terms of subscription to the stock of a railroad company, will not avoid an action upon the subscription contract. Agricultural &c. R. Co. *v.* Winchester, 13 Allen (Mass.), 29.

[4] Galpin *v.* Page, 18 Wall. (U. S.) 350, 371; Pulaski *v.* Stuart, 28 Gratt. (Va.) 872, 879; Werz *v.* Werz, 11 Mo. App. 30.

opposed to the policy of the law, but which the law favors. That such an engagement is voidable because not made in a particular way prescribed by a statute seems to find support in no principle of public policy and in no legal analogy; but it seems to be opposed to whatever analogy can be discovered. Take, for instance, the contract of suretyship. The liability of a surety is *strictissimi juris;* and yet where a principal, with sureties, undertakes to execute a statutory bond, but fails by reason of not complying with the statute, it is the constant practice of the courts, for the sake of justice, to hold the bond good as a common law obligation.[1] But in the particular under consideration, many of the courts, careless of justice, have permitted men to retreat from their solemn obligations after others have incurred obligations or changed their position on the faith of the same, — and this, on the refined ground that a contract such as will bind the intending obligors must be tendered to the other contracting party, — an artificial being not yet *in esse*, in the precise statutory mode, or not at all.

§ **1167. Difficulty Avoided by Subsequent Ratification.** — Other courts stumbling upon these refinements and endeavoring to be severely logical, have sometimes avoided the difficulty by discovering a subsequent *ratification*, taken place after the organization of the corporation, — as where the corporation issues and the subscriber accepts *certificates* representing the number of shares for which he subscribed. In such a case the contract is complete, and the corporation may maintain an action against him for assessments.[2] Such a ratification has been held to take place where, after the organization of the corporation, the subscriber recognizes the obligation of his subscription by making a *part payment* upon it. This, it is reasoned, is a sufficient renewal of his promise to the corporation, to enable them to maintain assumpsit for the balance, and the partial execution of the purpose designed by the charter, forms a sufficient consideration

[1] Murfree Off. Bonds, § 67; United States *v.* Maurice, 2 Brock. (U. S.) 96; Goodrum *v.* Carroll, 2 Humph. (Tenn.) 490; *s. c.* 37 Am. Dec. 564; Cleason *v.* Shaw, 5 Watts (Pa.) 468; *s. c.* 30 Am. Dec. 391.

[2] Taunton Turnp. Corp. *v.* Whiting, 10 Mass. 327; *s. c.* 6 Am. Dec. 124; Inter-Mountain Pub. Co. *v.* Jack, 5 Mont. 568; Compare Gilmore *v.* Polk, 5 Mass. 491.

for such promise.[1] The same consequences were held to follow where the subscriber had paid for one of his shares in full and transferred the others.[2]

§ 1168. **Subscription and Payment of Deposit.** — Possibly another statement amounts to the same thing, namely, that a subscription for a given number of shares of the stock of a corporation, accompanied by a payment of the deposit required of subscribers, makes the subscriber a stockholder in respect of the shares subscribed for.[3] But this would seem to proceed upon the assumption that the corporation is in existence at the time. For the mere acceptance of the deposit on behalf of a non-existent corporation could not possibly make the depositor a shareholder in the corporation when it should come into existence, where his subscription does not have that effect, unless some theory of ratification or adoption is resorted to.

§ 1169. **Another Road out of this Difficulty.** — Another road has been found out of this difficulty by reasoning that, although the underwriting of a subscription paper may have preceded in point of time the day of the meeting at which the corporation was organized, yet if it were actually *delivered* to the corporation on that day, the difficulty is obviated and the logical symmetry of the law preserved, — and this without reference to the inquiry whether its delivery actually antedated, in point of time, the organization of the corporation; since the law will so arrange the acts performed in one day, and relating to the same subject-matter, as to render them conformable to the intentions of the parties, without regarding which was in fact first produced or executed.[4] A *fiction* is thus resorted to in order to preserve the *logic* of the law.

§ 1170. **Rule that Subscriptions Made before Organization are Good.** — A great majority of the courts, disregarding such

[1] Kennebec &c. R. Co. *v.* Palmer, 34 Me. 336.

[2] Bell's Appeal, 115 Pa. St. 88; *s. c.* 2 Am. St. Rep. 532.

[3] Hayne *v.* Beauchamp, 5 Smed. & M. (Miss.) 515; Payne *v.* Ballard, 23 Miss. 88; *s. c.* 55 Am. Dec. 74; *Post*, §1216.

[4] Taunton Turnpike Corp. *v.* Whiting, 10 Mass. 327; *s. c.* 6 Am. Dec. 124.

subtleties and cutting through such refinements, hold that a subscription to the capital stock of an intended corporation, made before it comes into existence, becomes a binding contract when the corporation, on coming into existence, accepts it, either expressly by issuing to the subscriber his certificate, or impliedly by otherwise recognizing him as a shareholder and extending to him the rights which pertain to that relation. This is the general result of the doctrine of many cases, although in the opinions delivered it has been stated in various ways.[1] Under this rule it is not necessary, in order to become liable to the corporation for assessments as a shareholder, that the party should have affixed his signature to the articles of incorporation. He may acquire this liability by affixing it to any subscription paper which distinctly imports that he subscribes for a given number of shares of a certain value. "It matters not how informal the writing may be, if the intent of the parties can be collected from it." Accordingly, a writing, reciting the formation of an association for the purpose of organizing a bank, and stating, among other things "the names and residence of the shareholders, with the number of shares held by each," and subscribed by the corporators, has been held to constitute a subscription to the capital stock, on the part of the signers, and binds them to pay for the number of shares set opposite their names; and the corporation can maintain an action on such an instrument against any of the signers.[2]

[1] Hamilton &c. Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157; Gleaves *v.* Turnpike Co., 1 Sneed (Tenn.), 491; Tonica &c. R. Co. *v.* McNealy, 21 Ill. 71; Johnston *v.* Ewing &c. University, 35 Ill. 518; Lake Ontario R. Co. *v.* Mason, 16 N. Y. 451; Penobscot R. Co. *v.* Dummer, 40 Me. 172; *s. c* 63 Am. Dec. 654; Penobscot R. Co. *v.* White, 41 Me. 512; *s. c.* 66 Am. Dec. 257; Kennebec &c. R. Co. *v.* Palmer, 34 Me. 366; Thompson *v.* Page, 1 Metc. (Mass.) 565; Bell's Appeal, 115 Pa. St. 88; *s. c.* 2 Am. St. Rep. 532; Nulton *v.* Clayton, 54 Iowa, 425; *s. c.* 37 Am. Rep. 213; New Albany &c. R. Co. *v.* McCormick, 10 Ind. 499; *s. c.* 71 Am. Dec. 337; Mich. Midland &c. R. Co. *v.* Bacon, 33 Mich. 466; Cross *v.* Pinckneyville Mill Co., 17 Ill. 54; Red Wing Hotel Co. *v.* Friederich, 26 Minn. 112; Mahon *v.* Wood, 44 Cal. 462; Belton Compass Co. *v.* Saunders, 70 Tex. 699; *s. c.* 19 Am. & Eng. Corp. Cas. 284; 6 S. W. Rep. 134; Johnston *v.* Ewing &c. University, 35 Ill. 518; Glenn *v.* Busey, 5 Mackey (D. C.), 233; *s. c.* 4 Cent. Rep. 609; Ashuelot Boot &c. Co. *v.* Hoit, 56 N. H. 548.

[2] Nulton *v.* Clayton, 54 Ia. 425; *s. c.* 37 Am. Rep. 213.

§ **1171. Reasons in Support of this Rule.**— One court has reasoned that a subscription by a number of persons to the stock of a corporation, to be thereafter formed by them, constitutes a contract among the subscribers to become stockholders when the corporation is formed, upon the conditions expressed in the agreement, and is irrevocable from the date of the subscription; and is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it, becomes as to each subscriber a contract between him and the corporation.[1] The same court, struggling with the difficulties of this question has reasoned that a *promoter* of a proposed corporation, who solicits and procures stock subscriptions, is the *agent* of the body of subscribers to hold the subscriptions until the corporation is formed, and then to turn them over to it without further act of *delivery* on the part of the subscribers; and hence that a delivery of a subscription to such promoter is a complete delivery, so that it becomes, *eo instanti*, a binding contract as among the subscribers.[2] Another court has reasoned that, where, by the provisions of the contract of subscription, until the organization of the company, the subscription was subject to the acceptance or rejection of the *commissioners* appointed under the charter, and it did not appear that it was ever rejected by the commissioners or *disaffirmed* by the company after it became organized, it became binding on the company, and the subscriber became entitled to his certificates of shares and the corporation to the assessments made against the subscription.[3]

§ **1172. Nature of Such an Offer before Acceptance.** — The effect of an agreement to take shares in a corporation not yet organized has been thus stated in a recent case in Alabama by Mr. Chief Justice Stone: "An agreement to take shares in a corporation to be afterwards formed, while it may be and often is, a binding contract, for the breach of which an action may be

[1] Minneapolis Threshing-Machine Co. *v.* Davis, 40 Minn. 110; *s. c.* 12 Am. St. Rep. 701; 41 N. W. Rep. 1026; 3 L. R. A. 796; 26 Am. & Eng. Corp. Cas. 61.

[2] *Ibid.*

[3] Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181, 190. See also Townsend *v.* Alexander, 2 Oh. 19.

maintained, is, by force of the mere agreement, in no sense a subscription of stock. Something more must be done before it can be affirmed that the subscription is a completed contract. Till a charter is obtained or incorporation otherwise perfected, such agreement is a mere offer; or it is an option, revocable or not as the nature of the agreement may determine. The terms of the offer, and the consideration it rests on, may render it binding and irrevocable; or a failure to withdraw such offer, even when in its nature it is revocable, until it has been accepted by actual incorporation, may so bind the offerer that he cannot afterwards withdraw it. When it rests on a valuable consideration, such as a promise for a promise, then as a rule, it becomes an irrevocable option, provided incorporation according to the terms of the offer is perfected within a reasonable time. This would constitute the offerer in substance a stockholder. So, if an offer, which has no valuable consideration to rest on, be permitted to stand until it is accepted by incorporation according to its terms, this, it seems, would be an irrevocable subscription of stock."[1]

§ **1173. Instances under this Rule.** — Under this rule it has been held that a stock subscription made in contemplation of a *special charter* being granted by the legislature, creating a company to build a railroad is valid and enforceable by the railroad company when it comes into existence.[2] - - - - One of the original associates for the formation of a railway company, who signed a subscription, agreeing to take a certain number of shares of the capital stock of the proposed company, and to pay therefor "at such times and in such sums as the same shall be assessed, demanded, and required to be paid by the directors of said company," but who afterwards failed to sign the articles of incorporation, or to subscribe for stock on the commissioner's books, was held liable on his preliminary subscription, after the company had been formed, and assessments made and payment

[1] Knox *v.* Childersburg Land Co. 86 Ala. 180; *s. c.* 5 South. Rep. 578; citing: 1 Mor. Priv. Corp. § 47; *et seq.*; Music Hall Co. *v.* Carey, 116 Mass. 471; Road Co. *v.* Lancaster, 79 Ky. 552; Land Co. *v.* Aldrich, 86 Ill. 504; Publishing Co. *v.* Jack, 6 Pac. Rep. 20; Ferry Co. *v.* Balch, 8 Gray (Mass.), 303; 2 Wat. Corp., § 184; 1 Mor. Priv. Corp., § 128.

[2] Tonica &c. R. Co. *v.* McNealy, 21 Ill. 71. See also Belton Cotton Compress Co. *v.* Saunders, 70 Tex. 699; *s. c.* 19 Am. & Eng. Corp. Cas. 284; 6 S. W. Rep. 134.

demanded.[1] - - - - An action may be maintained in the name of a corporation after it is organized, against a subscriber upon the allotment to him of the shares subscribed for, on a contract wherein the subscribers "agree to and with each other," to associate themselves into a corporation to purchase a certain site for a town-hall, and to "pay to the treasurer of said corporation," the amount set against their respective names.[2] - - - - A promissory note executed for the purchase of a certain number of shares of a homestead association about to be formed, under a name and with a number of shares agreed upon when the note is given, does not fail for want of consideration, because the association when formed has a name or number of shares of stock different from that agreed on, provided the land is the same and the lots are of the same value as the promisor had reason to expect. But the giver of the note in such case is at liberty to stand on the terms of his contract, and if it was understood that the shares of stock he is to receive should not cost, in the aggregate, more than a certain sum per share, he is at liberty to refuse the stock if it will cost more than that sum, and the note is then void for want of consideration.[3]

§ 1174. Rights and Liabilities of Subscribers to a Common Fund for a Common Purpose.— In respect of the rights and liabilities of subscribers to a common fund for a common purpose, — as for instance, to a fund for the erection of an *academy*,— it has been observed that as soon as the subscription paper becomes complete by the subscription of the stipulated amount of money, the subscribers to it become an association of persons united for contributing to a common fund for a common purpose, to be carried out by themselves. Then the subscription of each (at least if not withdrawn before the actual organization of the associates) becomes a contract by each associate with his fellows, in consideration of similar contracts by them, to contribute to a common fund the amount subscribed by him. Such an act of association involves an agreement to organize the associates when the subscription shall become complete, and generally this is expressly provided for. The duties created by the act of subscription are duties to the association, and the first of them that is to be performed is the duty of

[1] Peninsular R. Co. *v.* Duncan, 28 Mich. 130. See also Buffalo &c. R. Co. *v.* Clark, 22 Hun (N. Y.), 359.

[2] Athol Music Hall Co. *v.* Carey, 116 Mass. 471.

[3] Mahon *v.* Wood, 44 Cal. 462.

organization; and when this is completed, the duty of paying the sum subscribed is a duty to the organized association. In a legal aspect, the most perfect form of organization is by legal incorporation; and therefore this, when regularly obtained by a common consent of the associates, must be regarded as the true organization of the association, and the corporation becomes the proper legal body to which the subscriptions are to be paid, and which is to sue for them. There can be but one true organization.[1]

§ 1175. Subscription Must be Accepted or Acted Upon. — It has been held, speaking of a subscription for the building of a church, that "to make such a subscription binding, it must be acceded to, as any other promise or offer, and the party apprised that his offer is accepted; and this must be done in a *reasonable time*.[2] Another court has held that a railroad company cannot recover on a subscription to the road without proof that the same has been accepted and acted upon; and that demand of payment and suit for its recovery are not evidence of acceptance where a subscription is otherwise invalid.[3] In a case in another State, it appeared that before a railroad company was incorporated, the defendant and others signed a paper agreeing that if it should be incorporated with certain privileges, they would subscribe the number of shares set opposite to their respective names. The charter was obtained, but the defendant refused to take the stock; and the company brought a bill to enforce specific performance of the contract. It was held that the bill should be dismissed, there being no binding contract; that if there were, it was not made with the plaintiffs, and that if the

[1] The text, with some slight variance, is drawn from the opinion of the Supreme Court of Pennsylvania by Lowrie, C. J., in Edinboro Academy *v.* Robinson, 37 Pa. St. 210; *s. c.* 78 Am. Dec. 421. As soon as the associates who have subscribed organize, the subscription is binding, and, if they incorporate in regular form, the corporation is authorized to collect the subscriptions (Shober *v.* Lancaster &c. Assn., 68 Pa. St. 431), and a subscriber is liable, though the mode of organization was without his direct and express assent. Robinson *v.* Edinboro Academy, 3 Grant Cas. (Pa.) 108; Hedges' Appeal, 63 Pa. St. 279.

[2] Galt *v.* Swain, 9 Gratt. (Va) 633; *s. c.* 60 Am. Dec. 311.

[3] Northern &c. R. Co. *v.* Eslow, 40 Mich. 222.

contract had been binding, and the plaintiffs were parties thereto, their remedy was at law.[1] So, in another State, sundry persons having subscribed an agreement to pay certain sums respectively for erecting an academy, and the legislature having afterwards incorporated certain trustees of such academy, and, in the act of incorporation, having provided that all moneys subscribed should be received and held by said trustees in trust for the academy, it was held that the corporation could not maintain an action on this agreement against a subscriber thereto, for the money by him subscribed.[2] In the same line of thought it has been held in New York that, where several parties subscribe for shares of stock in a seminary of learning, signing for such number of shares as each proposes to take and pay for, no implied authority can be inferred warranting any of the parties in contracting debts or advancing moneys on the credit of the other parties. The court reason that the agreement so signed is simply an agreement to take and pay for stock in an association to be incorporated, and does not contemplate the conduct of any enterprise as copartners, nor as members of an unincorporated joint-stock association. Such articles of association do not establish such relations between the subscribers as would authorize the trustee to contract debts or make advances on the credit of the association.[3]

§ 1176. Action against one Member of Building Committee by the other Members. — But a promise to pay to a building committee a certain amount of money to build a church, made by *one* of the committee, may, in Pennsylvania, be enforced by the other members of the committee or their survivors, by an action at law against the promisor. The court refused in such a case to higgle about the question whether the promisor were properly joined as plaintiff, reasoning that his name as plaintiff would be at most surplusage; but that, as no one could be legally bound by a promise to himself, the contract in the case was void in part only, but good for the residue, and the name of the promisor was properly dropped as that of plaintiff — at least it lessened the

[1] Strasburg R. Co. *v.* Etchternact, 21 Pa. St. 220; *s. c.* 60 Am. Dec. 49.

[2] Phillips Academy *v.* Davis, 11 Mass. 113; *s. c.* 6 Am. Dec. 162.

[3] Shibley *v.* Angle, 37 N. Y. 626.

appearance of irregularity.[1] In such case it was regarded as of no consequence that the building committee had finished the edifice and been *discharged.* "Though *functus officio* as to that, they were still trustees for the recovery of this debt." Nor was it of any importance that another committee had been raised to wait on the delinquent subscriber in reference to his obligation. "Even had the congregation desired to transfer this chose in action to another committee, so as to enable them to sue in their own names, it could not have done so; and the only course was to sue in the names of the surviving members of the original committee."[2]

§ 1177. **Acceptance Necessary if Corporation in Existence.** — If the corporation is in existence at the time when the subscription is made, then, unless the subscription takes the form of a proposal by the corporation and an acceptance by the subscriber, it must necessarily be regarded as a proposal by the subscriber to become a shareholder, so that in order to make a binding contract, the proposal must be accepted by the corporation; and some of the decisions proceed upon this view.[3] Thus, it has been held that a mere subscription to *preferred* capital stock, made after the organization of the corporation, while it will obligate the company to issue the stock upon the subscriber paying for it and will obligate him to pay for it, it yet does not give him an interest in the company, nor vest in him a title to the stock, until the contract has been *executed.*[4] Another court has reasoned, but upon grounds which the writer has ventured to criticise,[5] that the mere fact of subscribing to the stock of an incorporated company does not constitute the subscriber a stockholder; though it puts it in his power to become a stockholder, if the stock is not all filled up at the time of his subscription, by compelling the corporation to give him the legal evidence of his being a stockholder, namely, the usual stock *certificate*, upon his complying with the terms of his subscription.[6]

[1] Chambers *v.* Calhoun, 18 Pa. St. 13; *s. c.* 55 Am. Dec. 583.

[2] *Ibid.*

[3] Carlisle *v.* Saginaw Valley &c. R. Co., 27 Mich. 318; Parker *v.* Northern Central R. Co., 33 Mich. 23; Northern Central &c. R. Co. *v.* Eslow, 40 Mich. 222.

[4] St. Paul &c. R. Co. *v.* Robbins, 23 Minn. 439.

[5] *Post*, § 1188.

[6] Busey *v.* Hooper, 35 Md. 15; *s. c.* 6 Am. Rep. 351.

§ 1178. **Manner in which Acceptance Manifested.** — It is said by a late writer that "although no particular form of acceptance is essential, in order to constitute this proposition to become a shareholder a binding contract, there must be some *unequivocal act* on the part of the agents having the authority to accept the offer, so that there can be no doubt as to the obligation of the corporation as well as of the subscriber." [1] Very often there will be no formal writing, speech or act of acceptance. This will often happen where the corporation is one not having a joint stock, — as for instance a religious, educational or other charitable corporation. Here the usual form of acceptance will be the incurring of expense on the faith of the subscription; and this may be shown by parol evidence.[2]

§ 1179. **Distinction between Cases where the Proposition Comes from the Company and where it is Made to the Company.** — In respect of the time when the contract of subscription is deemed to be complete, a distinction exists between cases where the proposition for the subscription comes from the company to the subscriber, and where it comes from the subscriber to the company. In the former case, a proposition by or on behalf of the company, and an assent thereto by the subscriber, render the contract complete.[3] But where the proposition comes from the subscriber, there must obviously be an assent on the part of the company; otherwise it remains merely unilateral.[4] But in either case it is not doubted that until there is a meeting of the minds of both parties no binding contract exists.[5]

§ 1180. **Revocation of Offer before Acceptance.** — Where the corporation is in existence at the time of the subscription, the matter seems to stand on the mere footing of a contract

[1] 1 Mor. Priv. Corp. 2nd ed., § 48. See Parker *v.* Northern Central, &c., R. Co., 33 Mich. 23; Northern Central &c., R. Co. *v.* Eslow, 40 Mich. 222.

[2] Jones *v.* Florence, &c. University, 46 Ala. 626. See *post*, § 1206.

[3] European, &c., R. Co. *v.* McLeod, 3 Pugsley, N. B., 331, 340.

[4] British &c. Tel. Co. *v.* Colson, L. R. 6 Exch. 108; Wilkinson *v.* Anglo-California Co., 17 Jur. 231; Pellatt's Case, L. R. 2 Ch. 527; Gunn's Case, L. R. 3 Ch. 40; European &c., R. Co. *v.* McLeod, 3 Pugsley, N. B. 331, 340.

[5] Cook *v.* Oxley, 3 T. R. 653; Payne *v.* Cave, 3 T. R. 148; Routledge *v.* Grant, 4 Bing. 660.

between *two parties*, and obviously the proposal may be withdrawn before acceptance. The same conclusion would logically follow where the subscription is made with a view to the formation of a future corporation, if such an undertaking can be regarded merely as a proposal by the subscriber to the future corporation, which becomes a contract on the acceptance of it by the corporation when it comes into existence.[1] Proceeding on this view it has been held, in the case of a corporation formed under the general railroad act of New York, that, since such a corporation is not formed until the articles have been filed in the office of the secretary of state, a subscriber having the articles in his possession may, at any time before such filing, alter and reduce his subscription to any extent he pleases.[2]

§ 1181. **Whether Presumable in the Case of a Subscription to a Future Corporation.** — But caution should be exercised in accepting this doctrine in its application to a subscription to the stock of a projected corporation. In such a case, the subscription, in the view of an authoritative court, takes effect upon the filing of the certificate.[3] But the filing of the certificate cannot in any sense be regarded as an act of the corporation accepting the subscription. In fact, it is not the act of the corporation at all. It is the act of the promoters, or co-adventurers. The corporation does not, and cannot, act until its directors and principal officers have been elected; for it can, from its very nature, only act through them. This conveys to the mind the obvious suggestion that we must look beyond the theories of a mere contract for the principles which are to solve this question. The element of *estoppel* evidently enters into the engagement of the subscriber to the stock of an inchoate corporation, to an essential degree. His promise is something more than a proposal to a possible future company; it is a promise to his co-adventurers; and while it is not such a promise

1 See Mor. Priv. Corp. 2nd ed. § 50: Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 147; Goff *v.* Winchester College, 6 Bush (Ky.), 443; Greer *v.* Chartier's R. Co., 96 Pa. St. 391 *s. c.* 42; Am. Rep. 548, per Trunkey, J.

2 Burt *v.* Farrar, 24 Barb. (N. Y.) 518.

3 Phoenix Warehousing Co. *v.* Badger, 67 N. Y. 294.

to them as they can accept so as to enforce it by an action against him in their individual names — for the promise is not made to them as obligees, — yet, after they became liable on the faith of it, is it not a *fraud* on them for him to withdraw from it? This, it seems, must be the conclusion, unless we suppose that all the co-adventurers signed with a general understanding that it is a mere proposal until the corporation is in fact formed. But this theory, while undeniably logical, like much of the severe logic of the law, opens the door to unlimited frauds. Wealthy and influential men may head the subscription list with large amounts, thus influencing others to subscribe, and then, the very moment before the articles are filed, cancel or reduce their subscriptions, unknown to the others, — thus leaving the victims of their fraud bound while they are free. That the law does not allow this to be done we shall hereafter see.[1] We then take the true view to be that the engagement created by a subscription to the stock of a projected corporation is binding, in the absence of fraud inducing it, provided the corporation is formed according to the scheme within a reasonable time; and that the subscriber cannot in the interim, any more than after the corporation is formed, retreat from it without *unanimous consent.*

§ **1182. A Case in Illustration.** — Even where the corporation is in existence at the time, a state of circumstances may exist in which a subscriber will not be allowed to withdraw his name even before his subscription has been delivered to the company, — as where others have presumably subscribed on the faith and in pursuance of his subscription. Thus, where the subscriber was himself the agent of a corporation then in existence, to procure subscriptions to its capital stock, and he entered his own name in the subscription book furnished him for that purpose, as a subscriber to a certain number of its shares, and thereafter persuaded others to subscribe, and kept the book for about six months, and then cut his name out before he returned the book to the company, because of a difference respecting the payment for his services, — it was held that he was bound as a subscriber. The court reasoned thus: "The Chartiers Railway Company made a continuing offer which became an agreement with each acceptant for the number of shares for which he subscribed. At the time a person signed his

[1] *Post,* §§ 1311, 1151, *et seq.*

name, as a continuance of his act he might have erased it, as one who had written an acceptance of an offer by letter, before mailing the same might destroy it. But if the subscriber returned the book to the company's agent he could not afterwards witbdraw his subscription, for he had completed the agreement. Greer was acting as agent in soliciting subscriptions, no matter whether for pay or not; and, by procuring subscriptions under his own name, he declared his acceptance and admitted his agreemeut for the stipulated number of shares. The book was not his — he had no right to its possession but for a specific use. In that use he exhibited the evidence of his agreement with the company to every subsequent contracting party. Had the book been accidentally destroyed, there was ample evidence of the contents of the written contract, upon which he could have held the company to performance; or if it refused, to payment of damages. Clearly the company was bound to him the same as to any other subscriber, and so was he to the company. While he retained the book the written contract was in his hands — its validity did not depend on the conduct of the depositary — and its unauthorized mutilation did not annul it."[1]

§ 1183. Locus Pœnitentiæ where Subscription Illegal. — The principle that where an illegal contract or transaction is only partially performed, there is a *locus pœnitentiæ*, and either party may rescind the contract, applies to the case of a subscription to the stock of a corporation.[2]

§ 1184. Other Instances of Sufficient Subscriptions. — A subscription of stock "subject always to the by-laws, rules and articles of incorporation," one of which was that the stock should be paid for after five hundred shares had been subscribed, and that ten per cent. should be payable on the fifteenth of each month, has been held to render the subscriber a shareholder, and to make the installments become due even if no assessments were made.[3] - - - - The defendant, with others, signed a paper promising to pay to A. B., $100 for every share set opposite his name, for the purpose of building a plank road, etc., and authorized A. B. to transfer his subscription to a company hereafter to be formed for that purpose. The company was formed, and the subscription duly transferred. It was held that the defendant was bound by his subscription so transferred.[4] - - - -

[1] Greer v. Chartiers R. Co., 96 Pa. St. 391; s. c. 42 Am. Rep. 548.

[2] Knowlton v. Congress Spring Co., 14 Blatchf. (U. S.) 364.

[3] Waukon &c. R. Co. v. Dwyer 49 Iowa, 121.

[4] Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 155.

A certificate in all respects according to the requirements of a statute,[1] authorizing the business of banking, and concluding with the words "we have hereunto respectively subscribed and set our hands and seals, etc., and the number of shares of the capital stock of the corporation aforesaid taken and held by each of us respectively," is sufficient to render the signers stockholders, and liable to pay for the number of shares set against their names.[2]

§ 1185. Subscriptions Enforcible by Action Without an Express Promise to Pay. — The prevailing American doctrine, denied in some jurisdictions as hereafter seen, is that a subscription to a certain number of the shares of the capital stock of a projected or existing corporation, implies that the subscriber will pay for the shares, and imposes upon him an obligation to pay the assessments which are made thereon in pursuauce of the charter or by-laws, without any express promise in the subscription paper to do so; and this although the charter or governing statute also gives to the corporation a remedy by a forfeiture or sale of the shares, — the theory of the courts being that this remedy is cumulative merely:[3] in other words, that the ob-

[1] N. Y. Act of 1838, ch. 260.

[2] Coal *v.* Ryan, 52 Barb. (N. Y.) 168.

[3] Beene *v.* Cahawba &c. R. Co. 3 Ala. 660; Selma &c. R. Co. *v.* Tipton, 5 *Id.* 787; *s. c.* 39 Am. Dec. 344; Hartford &c. R. Co. *v.* Kennedy, 12 Conn. 499; Danbury &c. R. Co. *v.* Wilson, 22 *Id.* 435; Hightower *v.* Thornton, 8 Ga. 486; *s. c.* 52 Am. Dec. 638; Instone *v.* Frankfort Bridge Co., 2 Bibb (Ky.), 576; *s. c.* 5 Am. Dec. 638; Fry *v.* Lexington &c. R. Co., 2 Metc. (Ky.) 322; Hughes *v.* Antietam Man. Co., 34 Md. 316; Busey *v.* Hooper, 35 *Id.* 15; *s. c.* 6 Am. Rep. 350; Kennebec &c. R. Co. *v.* Jarvis, 34 Me. 360; Penobscot &c. R. Co. *v.* Dunn, 39 *Id.* 587; Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336; Lake Ontario &c. R. Co. *v.* Mason, 16 *Id.* 451; Rensselaer &c. Plank Road Co. *v.* Barton, *Id.* 457, 460; Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; Ogdensburgh &c. R. Co. *v.* Frost, 21 *Id.* 541; Frost *v.* Frostburg Coal Co., 24 How. (U. S.) 278; Upton *v.* Tribilcock, 91 U. S. 45; Webster *v.* Upton, *Id.* 65; Hawley *v.* Upton, 102 *Id.* 314; Dexter &c. Plank Road Co. *v.* Millerd, 3 Mich. 91; Carson *v.* Arctic Mining Co., 5 Mich. 288; Merrimac Mining Co. *v.* Bagley, 14 Mich. 501; Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Small *v.* Herkimer &c. Co., 2 N. Y. 330, 335; Hartford &c. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383; *s. c.* 40 Am. Dec. 354; Waukon &c. R. Co. *v.* Dwyer, 49 Ia. 121; Goshen Turnpike Co. *v.* Hurtin, 9 Johns. (N. Y.) 217; *s. c.* 6 Am. Dec. 273; Dutchess Cotton Man. Co. *v.* Davis, 14 Johns. (N. Y.) 238; *s. c.* 7 Am. Dec. 459; Troy &c. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Troy Turnpike Co. *v.* McChesney, 21 Wend. (N. Y.) 296; East Tenn. &c. R. Co. *v.* Gammon, 5 Sneed (Tenn.) 570; Herkimer Man. Co. *v.* Small, 21 Wend. (N. Y.)

ligation of actual payment is created in all cases by a subscription, unless the terms of subscription are such as plainly to exclude it.[1] It has been reasoned that, by the act of subscribing, each associate undertakes to raise his proportion of the capital, as it may be called for by the directors. And if the directors are authorized by the act of the legislature to make the call, the subscriber must pay. A right to call ordinarily implies a corresponding duty to pay.[2] "It is not at all essential that, at the time there is an original subscription, there shall be an express promise to pay the subscription price. Oftener than otherwise there is none, the subscription being a simple agreement to take so many shares of stock. By necessary implication there arises from such a subscription a promise to pay the par value of such stock, upon which an action of *assumpsit* lies."[3]

§ 1186. Illustration of the Foregoing. — Thus, a subscription running in the words, "We do hereby subscribe to the stock of the said railroad the number of shares annexed to our names respectively, on the terms, conditions and limitations mentioned" in the resolutions of the General Assembly incorporating the company, — was held to amount to an assumption to pay instalments as called; and this although the resolutions of the General Assembly did not declare that there should be any personal liability, but provided that the stock might be sold for unpaid requisitions.[4]

§ 1187. Doctrine that an Express Promise to Pay is Necessary. — Some of the New England courts have fallen into

273; Mann *v.* Cooke, 20 Conn. 178; Freeman *v.* Winchester, 10 Smed. & M. (Miss.) 577; Stokes *v.* Lebanon &c. T. Co., 6 Humph. (Tenn.) 241; Buckfield Branch R. Co. *v.* Irish, 39 Me. 44; City Hotel *v.* Dickinson, 6 Gray (Mass.) 586; Dayton *v.* Borst, 31 N. Y. 435; Fort Edwards &c. Plank Road Co. *v.* Payne, 17 Barb. (N. Y.) 567; Troy &c. R. Co. *v.* Tibbitts, 18 Barb. (N. Y.) 298; Merrimac Mining Co. *v.* Levy, 54 Pa. St. 237; Plank Road Co. *v.* Wetsel, 27 Barb. (N. Y.) 56; Miller *v.* Wild Cat Gravel Road Co., 52 Ind. 51; Joy *v.* Manion, 28 Mo. App. 55. Compare Robertson *v.* Sibley, 10 Minn. 823.

[1] Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161; Elysville *v.* Okiske Co., 5 Md. 152.

[2] Merrimac Mining Co. *v.* Levy, 54 Pa. St. 227; *s. c.* 97 Am. Dec. 697.

[3] West Nashville Planing Mill Co. *v.* Nashville Savings Bank, 86 Tenn. 252; *s. c.* 6 Am. St. Rep. 835, per Lurton, J.

[4] Hartford &c. R. Co. *v.* Kennedy, 12 Conn. 499. See also Ward *v.* Griswoldville Man. Co., 16 Conn. 593.

the unsound doctrine that unless an express promise is made by the subscriber to pay the subscription the corporation cannot maintain an action against him thereon, but its only remedy is to proceed to forfeit his shares in the mode prescribed by the charter.[1] Such courts had, of course, no difficulty in holding that such a subscriber could not be rendered liable, by a *by-law* or *vote* of the corporation, to do what all men of sense would say that he had agreed by his contract to do — pay for the shares.[2] The theory of these holdings is that the only remedy that the corporation has, in the absence of an express promise by the subscriber to pay, is to forfeit the shares, and, if possible sell them to some one else. One of them has gone so far as to hold that the fact that the corporation has, by statute, authority "to make and collect such assessments on the shares" as may be deemed expedient, in such manner as should be prescribed in their by-laws, does not enable it to maintain an action against the subscriber on his promise.[3] The same court, in a later case, hold that in the absence of an express promise by the subscriber to pay, a provision of the charter to the effect that the subscriber shall be liable for the balance remaining due after the sale of his shares, in case they are forfeited for non-payment of assessments, does not operate to make him personally liable on his subscription.[4] The Supreme Court of New Hampshire, after an examination of the authorities, concluded the true rule to be this: "Where a party makes an express promise to pay the assess-

[1] Andover Turnp. Corp. *v.* Gould, 6 Mass. 40; *s. c.* 4 Am. Dec. 80; New Bedford Turnp. Co. *v.* Adams, 8 Mass. 38; *s. c.* 5 Am. Dec. 81; Franklin Glass Co. *v.* White, 14 Mass. 286; Essex Bridge Co. *v.* Tuttle, 2 Vt. 393; Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181, 184; Franklin Glass Co. *v.* Alexander, 2 N. H. 380; *s. c.* 9 Am. Dec. 92; per Woodbury, J.; Worcester Turnpike Co. *v.* Willard, 5 Mass. 80; *s. c.* 4 Am. Dec. 39; Chester Glass Co. *v.* Dewey, 16 Mass. 94; *s. c.* 8 Am. Dec. 128; Katama Land Co. *v.* Jernegan, 126 Mass. 155; Mechanics' Foundry Co. *v.* Hall, 121 *Id.* 272; Belfast &c. R. Co. *v.* Moore, 60 Me. 561; Kennebec &c. R. Co. *v.* Kendall, 13 Me. 470; West *v.* Crawford, 80 Cal. 19; *s. c.* 21 Pac. Rep. 1123; Same *v.* Belding, *Id.* 1136; Same *v.* Hitchcock. *Id.*; Arkansas River Land T. & C. Co. *v.* Farmers Loan & Trust Co., 13 Colo. 587; *s. c.* 22 Pac. Rep. 954; Odd Fellows Hall Co. *v.* Glazier, 5 Harr. (Del.) 172; New Hampshire &c. R. Co. *v.* Johnson, 30 N. H. 390; *s. c.* 64 Am. Dec. 300.

[2] Kennebec &c. R. Co. *v.* Kendall, 13 Me. 470.

[3] Kennebec &c. R. Co. *v.* Kendall, 13 Me. 470.

[4] Belfast &c. R. Co., *v.* Moore, 60 Me. 561.

ments, he is answerable to the corporation upon such promise for all legal assessments, and may be compelled to its performance by action at law, before resorting to a sale of the shares. It is a personal undertaking, beyond the terms of the charter. Where, on the other hand, he only agrees to take a specified number of shares, without promising expressly to pay assessments, then resort must first be had to a sale of the shares to pay the assessments, before an action at law can be maintained. His agreement simply to take the shares is an agreement upon the faith of the charter, and by it alone is he to be governed, so far as his shares are to be affected. He takes them upon the conditions and law of the charter. They exist only by virtue of the charter, and are to be governed by the provisions therein contained."[1] But where the contract of subscription does contain an express promise to pay the assessments, and the conditions of the subscription have been performed, then by all the authorities an action of *assumpsit*, or other like action, can be maintained in the first instance, without a proceeding to forfeit the shares, or a declaration of forfeiture, sale of them, or other equivalent act.[2]

§ **1188. The Absurdity and Immorality of this Doctrine.** — This line of decisions is not at all creditable to American jurisprudence. 1. In the first place, there is a striking want of sense in a doctrine which makes a subscription, which does not contain an express promise to pay, tantamount to a promise to take the shares without paying for them, — or at best, to a promise to take them provided the promisor shall not conclude to change his mind. It is as though the courts should construe a written agreement to A. B. to buy of C. D. a horse of the value of $100, to create only a privilege in A. B. to get the horse, but not to create any obligation in him to do

[1] New Hampshire &c. R. Co. *v.* Johnson, 30 N. H. 390; *s. c.* 64 Am. Dec. 300.

[2] South Bay Meadow Dam Co. *v.* Gray, 30 Me. 547; Smith *v.* Natchez Steamboat Co., 1 How. (Miss.) 479; Salem Mill-Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23; Townsend *v.* Goewey, 19 Wend. (N. Y.) 424; *s. c.* 32 Am. Dec. 514; Dutchess Cotton Man. Co. *v.* Davis, 14 Johns. (N. Y.) 238; *s. c.* 7 Am. Dec. 459; Worcester Turnpike Co. *v.* Willard, 5 Mass. 80; *s. c.* 4 Am. Dec. 39; Andover, &c. T. Co. *v.* Gould, 6 Mass. 40; *s. c.* 4 Am. Dec. 80.

so, but merely to leave the vendor the remedy of putting an end to the option and selling the horse (if he can) to some one else. It is as though a man were to sign an agreement to take 1,000 bushels of wheat, deliverable at a certain time, at $1.00 a bushel, and then when the wheat should be tendered, be allowed to say to the intending vendor, "Although I agreed to take the wheat, I did not agree to pay for it," and thereupon the law should allow the vendor the remedy of keeping the wheat. It is a well understood rule in the interpretation of writings, that every part of a writing is, if possible, to be interpreted so as to mean *something*. But here is an interpretation which makes the subscripfion mean *nothing*, or even worse than *nothing*, for it may mean that, while it creates no obligation on the part of the subscriber, yet it does create an obligation on the part of the other party, the corporation. The subscription binds the corporation to issue to him the shares unless the subscriber shall subsequently elect to back out, — that is to say, he binds the other party and leaves himself free. 2. But this doctrine is no less nonsensical than immoral. It encourages men to break their written obligations, and this after others have acted on the faith of them to their disadvantage. We have seen that, in the view of some of the courts, such a subscription is a contract supported by the consideration that others have concurred in it and subscribed on the faith of it, and that to allow the subscriber to rescind will operate as a fraud on them. The courts which have set up the extraordinary doctrine on which we are commenting do not stumble at such difficulties, or at any others.

§ 1189. Illustration of the foregoing Doctrine. — It has been stated in illustration of the foregoing doctrine, that the instrument should contain something more than a promise to become a stockholder or proprietor of a given number of shares. "But if it contains in its language an acknowledgment of a personal liability thereon, and gives the right to enforce that obligation by the usual means of enforcing contracts at law, it would be equivalent to an express promise, and no court would hesitate to say that the party intended to create such liability for the purpose of giving to the corporation a cumulative remedy to that charter." Looking at the subscription before the court, it was therefore found that it first recited the existence of the charter and the names of the commissioners appointed by the legislature to open

the books and receive subscriptions to the capital stock of the company, and then recited, "And the subscribers agree to take the number of shares respectively placed against their names." The court said: "If the agreement rested there, the assessments could be enforced only by the forfeiture of their stock," — thus planting itself on the absurd conclusion that, although the subscriber agreed to take the number of shares set opposite his name, he did not agree thereby to pay for them. But, as the charter contained the further provision, "that the subscribers are *held to pay* to the amount which shall be assessed, and the company may enforce their claim thereto, with expense of collection, by sale of the shares, or by suit, or by either of those means," — it was held that an action might be maintained for assessments against the subscriber.[1]

§ 1190. When Contract to Take Shares Complete Under the English Statute.— The English courts have settled upon the rule that, in order to make a contract to take shares complete, there must be an application for the shares, an allotment of the shares to the applicant, and a communication to him of notice of the allotment.[2] By the 23d section of the Companies Act, 1862, these formalities are dispensed with where a person signs the memorandum of association. This section provides that "the subscribers of the memorandum of association of any company under this act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Under this statute the uniform ruling appears to have been that signing the memorandum of association makes a person a shareholder, and consequently a contributory, although no shares are in fact allotted to him.[3] It was so held in one case, although a year and a half had elapsed between the signing of the memorandum and the winding up, during which time no shares had been allotted to the signer.[4] But this rule does not, of course, apply where there are no shares available for allotment.

[1] Connecticut &c. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181, 185.

[2] Rogers Case, L. R. 3 Ch. 637; Pellot's Case, L. R. 2 Ch. 527, *per* Lord Cairns, L. J.; distinguishing Bloxam's Case, 33 Beav. 529; *s. c.* 12 W. R. 995.

[3] *Re* London & Provincial Consolidated Coal Co., 5 Ch. Div. 525; Evan's Case, L. R. 2 Ch. 427; Sidney's Case, L. R. 13 Eq. 228; Levick's Case, 40 L. J. (Ch.) 180; Hall's Case, L. R. 5 Ch. 707.

[4] Levick's Case, 40 L. J. (Ch.) 180.

Thus, where a person subscribed the memorandum of association, but took no part in its management, was never treated as a shareholder, his name was never entered on the register of shareholders, and the entire shares of capital were allotted to other persons, he was held not liable as a contributory.[1] But nevertheless in a similar case, where all the shares in the first instance had been allotted to other persons, yet some of the allotments had never been confirmed in the manner required by the memorandum of association, and there were, consequently, shares subject to allotment, the signer of the memorandum was put on the list of contributories.[2] Facts which show that the subscriber had knowledge that his application for shares had been accepted are held equivalent to the sending of a letter of allottment. Thus, L. applied for 1,000 shares in a company, as trustee for M. No letter of allotment was sent to L., but his name was put on the register in respect of those shares, and he was advertised as a director. He attended meetings of the directors, and for two years took no steps to have his name removed from the register. He was held a contributory in respect of 1,000 shares.[3]

§ 1191. What Facts Amount to a Contract to Take Shares. — What facts amount to a contract to take shares may be further illustrated by a variety of cases. A person desirous of being appointed local secretary of a company formally applied for a certain number of shares, which were allotted to him, with his knowledge, and he was duly registered as holder thereof. No particular shares were appropriated to him, but only the amount which he had agreed to take. No deposit was ever paid by the applicant upon the shares for which he applied, but, by agreement between himself and the company, the payments, on application and allotment, were to be set off against his salary and commissions. These facts were held by the court to constitute an agreement on the part of the applicant that he would, and on the part of the company that he should, become a member of the company, as the holder of the number of shares applied for.[4] In another case it was provided by the deed of settlement of the corporation that no transfer of stock should be valid without the approbation of the directors, to be "manifested by entries or memorandums to that effect in the share-register book, under the signatures of two of the directors for the time being, and by like memorandums, so signed, added to or endorsed upon the copies or certificates of the former entries respecting the shares in question in the share-register book; or, instead of such last-mentioned

[1] Mackley's Case, 1 Ch. Div. 247.

[2] Evan's Case, L. R. 2 Ch. 427.

[3] Levita's Case, L. R. 3 Ch. 36.

[4] Thomson's Case, 4 De G. J. & S. 749.

memorandums, by such copies or certificates being delivered to the parties entitled thereto, of the new or altered entries respecting the same in the share-register book. Shares were transferred to G. by two shareholders respectively. G's. name was entered by the secretary at the head of a page in the company's ledger, as also the number of shares transferred, both entries being made in pencil. This transfer took place November 13th, 1842. The company ceased to do business on December 31st, 1844, and was dissolved by a resolution of a general meeting on May 5th, 1847. The entry in the ledger remained as stated until the month of August, 1847, following the dissolution, when the secretary perfected the entry so made, with ink, and also added thereto the names of the transferors of said shares. G. was twice recognized as a shareholder, the only dividend which the company ever paid being paid to one D. according to his direction, and he was also summoned by the secretary, by letter, to a meeting of shareholders in July, 1845, to devise means for discharging the remaining liabilities of the company; to which letter G. responded, advising for this purpose the sale of certain premises owned by the company, which letter of G. was recorded in the minutes of the meeting. The vice-chancellor, while stating that the formalities of transfer, as required by the deed of settlement of the company, had not been complied with, yet said it depended upon the circumstances of each particular case as to what acts would dispense with these formalities, and held that in this case G. had been accepted as a shareholder by those who had the management of the affairs of the company, and who were for this purpose competent to act as they did act.[1]

§ **1192. Continued.** — And where the promoters of an intended company issued their prospectus headed "The Amazon Life Assurance and Loan Company and Sick Benefit Society," and the company was thereafter registered as "The Amazon Life Assurance and Loan Company," a person applied for shares (after such registration), addressing his application to the directors of the company as styled in the prospectus. Shares were allotted to him in the company as registered, and notice was sent to him on paper headed with the registered name of the company, to which he paid no attention; and on a further request by letter bearing the same heading he paid the deposit thereon. The following year the company was ordered to be wound up, and the applicant was made a contributory notwithstanding the change in the name; for he had ample notice of that in the notices sent to him of allotment, and in fact the company had a sick benefit department, although its registered name did not indicate it. Neither was it a de-

[1] Gordon's Case, 3 De G. & S. 249.

fense that he had been informed at the time of his application for shares that it was a company of limited liability. This was entirely a question of law.[1]

§ **1193. Continued.** — A promise in writing to take and fill a certain number of shares in a chartered company becomes, by a subsequent organization of the company and an acceptance of the subscription, a binding contract. Where the terms of the subscription require that seventy-five *per centum* of the estimated cost of any section of the railroad shall be subscribed for by *responsible persons* before commencing its construction, if the subscription is obtained in good faith, assessments will be valid, though some of the subscriptions to make up that amount may turn out to be worthless.[2] In 1837 a body of gentlemen, of whom the defendant was one, associated themselves together for the purpose of establishing a steamship line. The defendant attended meetings of the company from November, 1837, to March, 1838, as a director of the company, and his name appeared as a director in the prospectus issued in that period; but from March, 1838, he ceased to act as a director. On the following July 31st an act of Parliament was passed forming the company in question, in which act the defendant was named as a director. In July, 1839, a memorial was enrolled, but it did not contain the defendant's name, nor did he execute the company's deed, although a space was left therein for his name and seal, which was filled up in lead-pencil. The defendant did not take any shares, the necessary number for a director's qualification being fifty. A judgment was obtained against the company in November, 1843, in an action begun on April 15, 1840. The court, upon these facts, stated that the only question was whether the defendant was a member of the company in November, 1843. It was certain that he had been a member at one period; but the act of Parliament did not make him a member in that sense that it required an instrument of as high a nature to release him from membership. He had signed no deed, and it was competent for him to dissolve such partnership by parol; therefore the fact that the company's deed was never presented to him for execution and he in no manner co-operated with the directors subsequent to March, 1838, was evidence sufficiently conclusive to show that he had withdrawn from the company so effectually as to escape liability upon this judgment.[3]

[1] Blackburn's Case, 8 De G. M. & G. 177.

[2] Penobscot R. Co. *v.* Dummer, 40 Me. 172; *s. c.* 63 Am. Dec. 654.

[3] Scott *v.* Berkeley, 3 C. B. 925; *s. c.* 5 Rail. C. 51; 16 L. J. (C. P.) 107.

§ 1194. Continued.— After the formation of a company, and before its shares had been fully offered to the public, H. & Co., by letter, agreed with an agent of the company to "underwrite" a specified portion of the shares "at 15 per cent. discount," and "to pay the application money upon any balance of shares required to make up" the amount specified. In pursuance of this agreement, and without any further application by them, a certain smaller number of shares was allotted to them, which they declined to take. It was held, upon evidence as to the meaning of the term "underwrite" as applied to shares, that the agreement was not merely a guaranty, but was to be regarded as an application for such part of the shares specified as should not be applied for by the public, and authorized an allottment thereof to H. & Co.; that the word "discount" in the agreement was to be construed as "commission," so that the agreement was not one to issue shares at a discount; and that H. & Co. were liable as contributories in respect to the shares so allotted to them in the liquidation of the company.[1]

§ 1195. Continued. —The defendant, in an action for assessments, had signed, as indicated below, the following printed agreement: "We the undersigned, hereby authorize J. J. Imbrie, secretary of the Grangers' Market Company, to affix our names to the capital stock of the said company for the number of shares of said stock set opposite to our respective names.

Names.	No. Shares.	Amount.	Name of Grange.	Post office.
J. S. Vinson.	5.	$100.	Lena.	Umatilla Co., Or."

Printed upon the same sheet, and above this agreement, were the articles of incorporation of the plaintiff company. This document was held sufficient to authorize the secretary to subscribe for defendant for five shares of the capital stock of the corporation; but an execution of this power was not sufficiently demonstrated, so as to constitute the defendant a stockholder, by the secretary writing the name of defendant in a list headed "Stockholders," in the stock-book of the corporation, and opposite the name so entered, the words "Lena," "Umatilla Co., Oregon," "5," "$100."[2]

[1] *Re* Licensed Victuallers &c. Assoc., 42 Ch. Div. 1.

[2] Grangers' Market Co., *v.* Vinson, 6 Oreg. 172. This decision is given out of a desire not to overlook applicatory cases; but it is thought to be clearly unsound.

Article II. Theories as to the Consideration.

§ 1200. Theories as to the Consideration of the Contract. — Where both parties to a contract are *in esse* at the time when the proposal is made, *mutuality of promise* constitutes a good consideration. But where the very proposal is a part of the thing required to be done in order to bring the other party to the contract into existence, a wide field is open for theorizing as to the nature of the consideration. The courts, in their search for the consideration for such a contract, have indulged in a variety of speculations more curious than useful. Nevertheless, it is proposed to follow them briefly.

§ 1201. Rights and Interest Acquired by the Subscriber. — Some courts have found the consideration of the contract in the interest in the corporation thereby acquired by the subscriber,[1]— in the right which he thereby acquires to participate in the pecuniary dividends; and it has been reasoned that where the agreement secures that to the subscribers, on the organization of the company, the objection of a want of consideration cannot be made with success.[2] But the same must be equally true where

[1] East Tennesee &c. R. Co. *v.* Gammon, 5 Sneed (Tenn.), 567; Kennebec &c. R. Co. *v.* Jarvis, 34 Me. 360.

[2] Hamilton &c. Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157.

the subscription paper is silent on the subject, for all this is implied.

§ 1202. **Obligation of the Company to Issue the Shares.** — It is merely another way of expressing the same idea to say that the obligation of the corporation to issue the shares to the subscriber [1] — that is, to admit him to a share in its management and in its profits, — constitutes a good consideration for such a promise.[2]

§ 1203. **Franchises Granted by the Charter.** — A vague expression of the same idea is found in another case, that the consideration of such a contract consists in the franchises granted by the charter,[3] — implying that those franchises inure to the benefit of the subscriber.

§ 1204. **Failure of the Commissioners to Reject the Subscription.** — Where the subscriptions are taken by commissioners, as was generally the case in the days of special charters,[4] they were deemed public officers or agents for the purpose. They occupied a position somewhat analogous to that of a *promoter* under the English theory,[5] except that they generally acted in the execution of a statutory power. Where they had power to *reject* the subscription, a species of mutuality was created by their *acceptance* of it; and this has been regarded as furnishing a sufficient consideration.[6]

§ 1205. **Mutuality of Promise as among the Subscribers.** — Other courts have found in the act of the particular subscriber in subscribing with *others*, a mutuality of promise which obliges him to make good his promise to the corporation after it comes into its existence.[7] Decisions are not wanting which either deny

[1] As to which see *post*, § 1249.

[2] Richmondville Seminary *v.* McDonald, 34 N. Y. 379; St. Paul &c. R. Co. *v.* Robbins, 23 Minn. 439.

[3] Thigpen *v.* Mississippi &c. R. Co., 32 Miss. 347.

[4] *Ante*, § 44.

[5] *Ante*, § 415.

[6] Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181.

[7] Belton Compress *v.* Saunders, 70 Tex. 699; *s. c.* 19 Am. & Eng. Corp. Cas. 284; 6 S. W. Rep. 134; West *v.* Crawford, 80 Cal. 19; *s. c.* 21 Pac. Rep. 1123; 26 Am. & Eng. Corp. Cas. 85; Trustees *v.* Stetson, 5 Pick. (Mass.)

this principle or hold it to be inapplicable; but they seem, on examination, to be cases where no payee is named or designated, or where the one designated is either incapable of acting, or does not assume and is not bound to act.[1] With reference to this question it has been observed: "So far as the question of consideration goes, the general rule is that mere promises of gifts, even to public uses, made without consideration, cannot be enforced as contracts. But it is also a rule in cases of simple contract that, if one person makes a promise to another, for the benefit of a third, the third may maintain an action upon it, though the consideration does not move from him. The mutual promises of the several subscribers in this case constitute a sufficient consideration, and, that the promise is to pay a third party, is not a tenable objection; and the promise is binding, though the corporation to which the payment is to be made is not then *in esse*, but to be formed thereafter."[2] The governing principle has been brought out with great clearness by a decision of the House of Lords, where it is held that if a number of persons, meaning to join in a common undertaking, raise a common fund, eventually to be increased, but commencing by a deposit, and they put these deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one or more of the subscribers, against the will of the others, to withdraw and say, "I think, or we think, you ought not to go any further." Any one subscriber who is not of that opinion has a right to say, "I gave my money upon the faith that we all embarked in one common undertaking, and till that has been done, which we agreed should be done, none have a right to withdraw and say you shall not go any further."[3]

506; Watkins *v.* Eames, 9 Cush. (Mass.) 537; George *v.* Harris, 4 N. H. 533; Congregational Society *v.* Perry, 6 N. H. 164; Troy Academy *v.* Nelson, 24 Vt. 189; Amherst Academy *v.* Cowls, 6 Pick. (Mass.) 427. Compare New York &c. Co. *v.* Martin, 13 Minn. 417.

[1] Boutell *v.* Cowdin, 9 Mass. 254; Phillips Academy *v.* Davis, 11 Mass. 113; *s. c.* 6 Am. Dec. 162. Compare Farmington Academy *v.* Allen, 14 Mass. 172.

[2] New Lindell Hotel Co. *v.* Smith, 13 Mo. App. 7, 14; opinion by Bakewell, J.

[3] Baird *v.* Ross, 2 Macqueen, 61. See also Burnes *v.* Pennell, 2 H. L. C. 497. Compare Kent *v.* Jackson, 14 Beav. 367; *s. c.* 2 De G. Mac. & G. 49. As to the right of scrip holders to have the money subscribed by them applied

"'It follows from this," says Sir N. Lindley, "that no subscriber to a projected company can recover back his money on the ground that the consideration for his subscription has failed, until the formation of the company, upon the terms assented to by him,[1] has been abandoned, or has become impracticable."[2]

§ 1206. Labor or Money Expended on the Faith of the Promise. — If a subscription contains a *request*, express or implied, for the expenditure of labor or money to carry out the object for which it is made, and such labor or money are expended, it will constitute a good consideration for the promise.[3] Speaking with reference to this question it has been said: "At first view it would seem that, when a person signs his name to a promise to pay money or to convey property to an institution of learning, the public advantage and the fact that others have been induced by their reliance upon his co-operation to give their money and property to the same object, ought to be a sufficient consideration; but the courts, acting upon the principle that every promise, to be enforced, must have a good or valuable consideration to uphold it, have held that something more than the naked promise to give is necessary, and that the *public advantage* is not of itself a sufficient consideration, to support a promise.[4] Yet, while the courts, rather than violate an old and

to the purposes for which they subscribed it, see Bagshaw *v.* The Eastern Rail. Co., 7 Hare, 114; *s. c.* 2 Mac. & G. 389.

[1] Citing Johnson *v.* Goslett, 18 C. B. (N. S.) 569, and see also Wilson *v.* Church, 13 Ch. Div. 1, and *s. c.* under the name of National Bolivian Nav. Co. *v.* Wilson, 5 App. Cas. 176.

[2] Lind. Comp. L., 5th ed., pp. 29, 30.

[3] "A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party promising or of loss to the other party. If a subscription be acceeded to on the terms in which it is made, and labor or money is expended on the faith thereof, the party making the subscription is bound thereby." Galt *v.* Swain, 9 Gratt. (Va.) 633; *s. c.* 60 Am. Dec. 311. Where work is done or expense incurred *under a promise*, the liability is not disputed by any authority. Underwood *v.* Waldron, 12 Mich. 73, 89, opinion by Campbell, J. Labor performed and money spent to secure the *location of a railroad depot* are sufficient consideration to support a promise contained in a subscription to pay money for that object. Workman *v.* Campbell, 46 Mo. 305. See also Koch *v.* Lay, 38 Mo. 147; Farmington Academy *v.* Allen, 14 Mass. 172; *s. c.* 7 Am. Dec. 201; Cook *v.* McNaughton, 128 Ind. 410; *s. c.* 24 N. E. Rep. 361.

[4] Citing Trustees *v.* Stewart, 1 N. Y. 681; Howard *v.* Williams, 2 Pick. (Mass.) 80.

established rule of law, hold that a naked promise to pay money for a public object can not be enforced for the want of a consideration, they have also decided with great unanimity, that if the promise itself, or any other promise, upon which it is founded, contains a request, or that which by any fair construction can be construed as a request to the trustees, or others representing the institution for whose benefit the promise is made, to do any act, or incur any expense, or to undergo any inconvenience, and such institution does the act, or incurs the expense, or submits to the inconvenience, this request and performance on the behalf of the institution is a sufficient consideration to support the promise." [1]

§ **1207. Illustrations of this Principle.**—Applying this principle, where the subscriber gave his note for his subscription to endow a *college*, and the payee, upon the faith of it, had incurred expense, it was held that it was enforcible.[2] - - - - It has been held that a subscription by citizens in pursuance of an act of the legislature, to a fund for the building of a *state house*, is not void for want of consideration, but may be supported on the theory that the State, through the act of the legislature, has undertaken to apply the funds for that purpose.[3] - - - - The defendant subscribed toward the payment of a debt due for the building of a *church edifice*. The trustees of the church, in their corporate capacity, but on the faith of the subscription list, borrowed money with which to pay the church debt. It was held that the subscriber was bound; since "the lender of the money may have relied for his payment, not merely on the credit of the trustees in their corporate capacity, but on the subscription list in their hands." [4]

§ **1208. Contrary View that Money not Deemed Expended on the Faith of the Subscription: Formation of Corporation not Authorized Thereby.** — It has been reasoned upon this subject that the consideration which is necessary to support a subscription, and indeed any other contract, with the exception of negotiable paper, must be a consideration derived by one party from another party to the

[1] Philomath College *v.* Hartless, 6 Ore. 158; *s. c.* 25 Am. Rep. 510, 511; opinion by Watson, J.; citing Barnes *v.* Perine, 12 N. Y. 18; Trustees *v.* Garvey, 53 Ill. 401; *s. c.* 5 Am. Rep. 51; McAuley *v.* Billenger, 20 Johns. (N. Y.) 89; Thompson *v.* Mercer Co., 40 Ill. 379.

[2] Philomath College *v.* Hartless, 6 Ore. 158; *s. c.* 25 Am. Rep. 510.

[3] State Treasurer *v.* Cross, 9 Vt. 289; *s. c.* 31 Am. Dec. 626. Compare University *v.* Buell, 2 Vt. 48, and Carpenter *v.* Mason, 3 Scam. (Ill.) 376.

[4] Trustees *v.* Garvey, 53 Ill. 401; *s. c.* 5 Am. Rep. 51.

action. When, therefore, a subscription is made, but the subscription paper does not authorize the formation of a corporation to carry out its purposes, and nevertheless *some* of the subscribers thereafter undertake to form a corporation for that purpose, the corporation cannot maintain, on the contract of subscription, an action against a subscriber who does not assent to its formation. Nor can such an action be maintained on the theory that the corporation, by expending money on the faith of the subscription, has raised a consideration such as makes it binding. "There is no proof," said Shepley C. J., speaking of such a case, "of an expenditure of money by the corporation *at the request* of the defendant, express or implied, or for a purpose from which he could derive any benefit. The corporation does not appear to have expended money except for property or purposes of its own, in which the defendant had no interest."[1]

§ 1209. Consideration where the Corporation is in Existence. — Where the corporation is in existence at the time when the subscription is made, no room is left for these speculations; since there is a mutuality of promise on the part of each of the parties that must be performed.[2] But even here the courts have frequently discovered the consideration in additional circumstances. Thus, where the corporation had been chartered, and a subscription to its stock was in the following terms, which were the terms prescribed by its charter, it was held to embody a good contract: "We, whose names are hereunto subscribed, do, for ourselves and our legal representatives, promise to pay to the president, directors and company of the Union Turnpike Road, the sum of $25, for every share of stock in such company, set opposite to our respective names, in such manner and proportion, and at such time and place, as shall be determined by the said president, directors and company." "That form," said the court, "contains an absolute promise to pay the money to the president, directors and company. On the one side the interest of the company selling the shares, and the public advantage to be derived from the success of the institution, and on the other, the expected profits to accrue from the stock, were sufficient consideration to uphold the promise."[3]

1 Machias Hotel Co. *v.* Coyle, 35 Me. 405; *s. c.* 58 Am. Dec. 712.

2 Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; *s. c.* 39 Am. Dec. 344, 352.

3 Union Turnpike Co. *v.* Jenkins, 1 Caines (N. Y.) 381, 390.

§ 1210. Effect of the Words "Value Received." — The words "value received" in a subscription paper have been held to import *prima facie* a consideration, and to render the subscriber liable, irrespective of the question whether he actually became a member of the corporation. This will appear from a case where the defendant subscribed an instrument, promising, for value received, to pay the amount of certain shares to two persons, for the purpose of building a plank road designated, and authorizing those persons to transfer the subscriptions to a company to be formed; and the company was organized for this purpose. It was held, in an action by the company to enforce the contract, that, though the defendant never signed articles of association, nor accepted stock, and could not be considered a member of the company, he was liable on his promise for the amount of his subscription; that the words "value received" were *prima facie* evidence of consideration for his promise; and that no consideration need be shown for the transfer by said persons to the company, other than that arising on the facts stated.[1]

§ 1211. Subscription a Good Consideration for Other Undertakings. — A subscription for stock of a company, being a legal obligation, which can be enforced by action, and by forfeiture for non-payment, is therefore a good consideration for a mortgage to secure the payment of the amount subscribed.[2] On a principle already considered,[3] such a subscription is a good consideration for a promise on the part of other persons to pay money towards the undertaking.[4]

§ 1212. Subsequent Failure of Consideration. — Where payment for the shares has been secured by a mortgage, as stated in the preceding section, the neglect or omission of the company to issue to the mortgagor scrip for his shares before payment, will not amount to a failure of the consideration, — especially where it appears that, by so doing, they will make

[1] Eastern Plank Road Co. *v.* Vaughan, 14 N. Y. 546; affirming *s. c.* 20 Barb. (N. Y.) 155.

[2] Buttershall *v.* Davis, 31 Barb. (N. Y.) 323.

[3] *Ante*, § 1206.

[4] Ashuelot Boot &c. Co. *v.* Hoit, 50 N. H. 548.

themselves personally liable to the creditors of the company.[1] Moreover, as we shall hereafter see more fully,[2] such a consideration does not fail in the theory of the law, because of the failure of the corporation, at the time when the action is brought, to enforce the contract to construct their works in accordance with the declarations of the promoters of the corporation, on the faith of which the promise of the subscriber was made; since the very object of the subscription is to assist in affording the means to construct their works. The *agreement to construct* remains a sufficient consideration for the subscription.[3]

§ **1213. No Consideration where the Company, and not the Subscriber, Gets the Shares.** — One court has rendered a decision which is tantamount to holding that where a subscriber gets no direct personal benefit from his subscription — more briefly where he *does not get the shares*, — there is no consideration for the promise, — as where the subscription contract, not under seal, of a mining company, was conditioned that two thousand of the capital shares should be paid to trustees, to be by them held for the benefit of and subject to the direction of the company. Here it was held that, the trustees being, *pro hac vice*, the servants of the company, and their possession, its possession, the consideration was too shadowy to support a contract.[4] But it has already been sufficiently shown that a direct benefit to the promisor is not at all necessary to support the contract. It may consist in detriment to others, or in the fact of others acting on the faith of it.[5]

[1] Buttershall *v.* Davis, 31 Barb. (N. Y.) 323.

[2] *Post*, § 1975.

[3] First Nat. Bank *v.* Hurford, 29 Iowa, 579.

[4] New York &c. Co. *v.* Martin, 13 Minn. 417.

[5] *Ante*, § 1205.

ARTICLE III. THEORIES AS TO THE NECESSITY OF PAYING THE STATUTORY DEPOSIT.

§ 1216. View that Payment of Cash Deposit is Necessary to the Validity of the Subscription. — Where the charter or governing statute requires the payment in cash of a certain percentage of the amount subscribed, at the time of making the subscription, there is a division of judicial opinion upon the question whether this payment is necessary to give binding force to the contract. Many of the courts hold that it is necessary where the subscription is made before organization.[1]

[1] Fiser *v.* Mississippi &c. R. Co., 32 Miss. 359; State Ins. Co. *v.* Redmond, 1 McCrary (U. S.), 308; Perry *v.* Hoadley, 19 Abb. N. Cas. (N. Y.) 76; People *v.* Chambers, 42 Cal. 201; Charlotte &c. R. Co. *v.* Blakely, 3 Strobh. (S. C.) 245; Wood *v.* Coosa &c. R. Co. 32 Ga. 273; Jenkins *v.* Union Turnp. Co., 1 Caines Cas. (N. Y.) 86, 94 (recognized in Goshen Turnp. Co. *v.* Hurtin, 9 Johns. (N. Y.) 217; *s. c.* 6 Am. Dec. 273); Highland Turnp. Co. *v.* McKean, 11 Johns. (N. Y.) 98; Dutchess Cotton Manufactory *v.* Davis, 14 Johns. (N. Y.) 238; *s. c.* 7 Am. Dec. 459. These three last decisions state that this was the ground on which the case of Jenkins *v.* Union Turnp. Co., *supra*, was finally determined in the Court of Errors. But as hereafter seen, they no longer express the law of New York on the subject, *Post*, §1224. The same view was taken of the necessity of

§ 1217. Reasons in Support of this View. — These decisions proceed upon the rule that the provisions of the charter of the corporation are to be *strictly pursued*, and that, the charter having provided that subscriptions to the capital stock shall be taken in a certain way, they cannot be taken in any other way. They reason that the payment of the deposit required by the statute is a *condition precedent* to the validity of the contract; that the subscription stands as a mere *proposal* until the deposit is paid; and that it is neither competent for the commissioners nor for the corporation to accept this proposal until the condition prescribed by the statute has been complied with. Until then, there is, under this theory, no contract which binds either party, or through which either party can derive any rights against the subscriber.[1] The subscriber cannot demand any rights in the corporation; the corporation cannot maintain an action against him to enforce his subscription;[2] nor can the creditors of the corporation enforce their demands against him.[3] "A corporation," said one court, "being the creature of the law, can act in no other manner than the law prescribes, and cannot be permitted to enter into a contest in the legislature concerning the policy or expediency of the terms which have been dictated."[4] In the leading case in Pennsylvania, Chief Justice

complying with the charter provision requiring the payment of a deposit, in Hibernia Turnp. Corp. *v.* Henderson, 8 Serg. & R. (Pa.) 219; *s. c.* 11 Am. Dec. 593. And this decision was reaffirmed in Leighty *v.* President &c., 14 Serg. & R. (Pa.) 434. The same view was taken in Taggart *v.* Western Maryland R. Co., 24 Md. 563; *s. c.* 89 Am. Dec. 760. Compare Hanover Junction &c. R. Co. *v.* Grubb, 82 Pa. St. 36; Erie &c. Plank Rd. Co. *v.* Brown, 25 Pa. St. 156.

[1] Reasoning in Perry *v.* Hoadley, 19 Abb. N. Cas. (N. Y.) 76, and cases cited below.

[2] Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169; Excelsior Grain Binder Co. *v.* Stayner, 58 How. Pr. (N. Y.) 273; Wood *v.* Coosa &c. R. Co., 32 Ga. 273; Highland Turnp. Co. *v.* M'Kean, 11 Johns. (N. Y.) 100; Goshen Turnp. Co. *v.* Hurtin, 9 Johns. (N. Y.) 218; *s. c.* 6 Am. Dec, 273; Hibernia Turnp. Co. *v.* Henderson, 8 Serg. & R. (Pa.) 219; *s. c.* 11 Am. Dec. 593.

[3] Perry *v.* Hoadley, 19 Abb. N. Cas. (N. Y.) 76.

[4] Hibernia Turnp. Corp. *v.* Henderson, 8 Serg. & R. 219; *s. c.* 11 Am. Dec. 593; opinion by Tilghman, C. J. The learned judge referred to Mitchell *v.* Smith, 1 Binn. (Pa.) 110 (*s. c.* 2 Am. Dec. 417) and Maybin *v.* Conlon, 4 Dall. (U. S.) 298, as settling the point that a contract made in violation of an act of the legislature cannot be enforced in a court of justice. The legislatures have sometimes been obliged to pass *curative acts* to validate subscriptions thus made and

Gibson,[1] whose opinions have always been held in high respect by the profession, expressed the view that the design of this provision of the statute was to prevent the subscription list being filled by *fictitious subscribers*, who should be favorites of the commissioners, or the creatures of other interested persons. He reasoned that it would be a fraud on the law and on the fair subscriber, to admit to equal participation in the administration of the corporate affairs, men who had not paid the required deposit, with men who had.[2]

§ 1218. Rule that Payment of Deposit must be Made in Specie or its Equivalent. — Under this strict rule, the theory of several courts was that specie or its equivalent, current bills of specie paying banks, could only be received in payment of the sum required to be paid at the time of subscribing the stock.[3]

§ 1219. Statute not Complied with by Giving a Note. — The courts which take this view hold that the giving of a *promissory note* for the amount required to be paid, is not a payment, nor a sufficient compliance with a statute which requires payment in cash; and where such a payment was attempted the subscription was void and imposed no obligation on the subscriber.[4] Where the charter of a railroad company required that "its treasurer and president should, before receiving an installment from the State, satisfactorily assure the board of internal improvements, by a certificate under the seal of the company, that

prevent the subscribers from taking advantage of their own wrong. See Clark *v.* Navigation Co., 10 Watts (Pa.), 364.

[1] He was not chief justice at the time of this decision.

[2] See his opinion in Hibernia Turnp. Corp. *v.* Henderson, 8 Serg. & R. (Pa.) 219; *s. c.* 11 Am. Dec. 593, 597. These views were quoted with approval by the Court of Appeals of Maryland in Taggart *v.* Western Maryland R. Co., 24 Md. 563; *s. c.* 89 Am. Dec. 760, where the authorities on the subject are reviewed at considerable length.

[3] Crocker *v.* Crane, 21 Wend. (N. Y.) 211; People *v.* Troy House Co. 44 Barb. (N. Y.) 625; Neuse River &c. Co. *v.* Newburn, 7 Jones L. (N. C.), 275; Henry *v.* Vermillion &c. R. Co., 17 Ohio, 187; McRae *v.* Russell, 12 Ired. (N. C.) L. 224.

[4] Leighty *v.* Susquehanna &c. Co., 14 Serg. & R. (Pa.) 434; Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169; McRae *v.* Russell, 12 Ired. L. (N. C.) 224; Hayne *v.* Beauchamp, 5 Smed. & M. (Miss.) 515.

an amount of the private subscription had been paid, in equal proportion to the payment required by the State," it was held that, for the railroad company to take, as cash, the notes of individuals made for the occasion to enable the officers to make the certificate, under a promise that such notes were not to be enforced, was *immoral* and *against public policy*, and such individuals being in *pari delicto*, had no equity to be relieved against such notes.[1]

§ 1220. A Contrary View. — Other courts take the view that it may be paid by a *promissory note* of the subscriber, if the corporation is willing to receive it as *money*, and to give a receipt for it as money.[2] Where, as stated in a subsequent section, the

[1] McRae *v.* Atlantic &c. R. Co., 5 Jones Eq. (N. C.) 395.

[2] Greenville &c. R. Co. *v.* Woodsides, 5 Rich. L. (S. C) 145; *s. c.* 55 Am. Dec. 708. Compare Clark *v.* Farrington, 11 Wis. 330, where this case is cited. As to when the giving and accepting of a promissory note for an indebtedness will be presumed to be due payment and when not, see Milledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158; *s. c.* 51 Am. Dec. 59; Arnold *v.* Delano, 4 Cush. (Mass.) 33; *s. c.* 50 Am. Dec. 754; Wolf *v.* Fink, 1 Pa. St. 435; *s. c.* 44 Am. Dec. 141; Steamship Charlotte *v.* Hammond, 9 Mo. 59; *s. c.* 43 Am. Dec. 536; Brooks *v.* Mastyn, 69 Mo. 63: Bertiaux *v.* Dillon, 20 Mo. App. 605; McMurray *v.* Taylor, 30 Mo. 263; *s. c.* 77 Am. Dec. 611; Howard *v.* Jones, 33 Mo. 583; Powell *v.* Blow, 34 Mo. 485; Block *v.* Dorman, 51 Mo. 31; Leabo *v.* Goode, 67 Mo. 126; Appleton *v.* Kinnon, 19 Mo. 637; Steamboat *v.* Lumm, 9 Mo. 64; Lee *v.* Fontaine, 10 Ala. 755; *s. c.* 44 Am. Dec. 505; Judge *v.* Fiske, 2 Spears L. (S. C.) 436; *s. c.* 42 Am. Dec. 380; Jones *v.* Johnson, 3 Watts & S. (Pa.) 276; *s. c.* 38 Am. Dec. 760. The prevailing view is that the giving and accepting of a promissory note does not extinguish a debt, unless the parties so *intend*, but that if the note is not paid the creditor may sue on the original cause of action. This is held in many of the cases above cited, and also in the following: Pateshall *v.* Apthorp, Quincy (Mass.), 179; *s. c.* 1 Am. Dec. 3; Murray *v.* Gouverneur et. al. 2 Johns. Cas. (N. Y.) 438; *s. c.* 1 Am. Dec. 177; Tobey *v.* Barber, 5 Johns. (N. Y.) 58; *s. c.* 4 Am. Dec. 326; Johnson *v.* Weed, 9 Johns. (N. Y.) 310; *s. c.* 6 Am. Dec. 279; Barelli *v.* Brown, 1 McCord (S. C.) 449; *s. c.* 10 Am. Dec. 683; Muldon *v.* Whitlock, 1 Cow. (N. Y.) 290; *s. c.* 13 Am. Dec. 533; Patapsco Ins. Co. *v.* Smith, 6 Harr. & J. (Md.) 166; *s. c.* 14 Am. Dec. 268; Hart *v.* Boller, 15 Serg. & R. (Pa.) 162; *s. c.* 16 Am. Dec. 536; Costelo *v.* Cave, 2 Hill (N. Y.), 528; *s. c.* 27 Am. Dec. 404; Estate of Davis et al., 5 Whart. (Pa.) 530; *s. c.* 34 Am. Dec. 574. But, *contra*, see Newell *v.* Hussey, 18 Me. 249; *s. c.* 36 Am. Dec. 717; Wright *v.* Crockery Ware Co., 1 N. H. 281; *s. c.* 8 Am. Dec. 68; Varner *v.* Nobleborough, 2 Greenl. (Me.) 121; *s. c.* 11 Am. Dec. 48; Hutchins *v.* Olcutt, 4 Vt. 549; *s. c.* 24 Am. Dec. 634; Homes *v.* Smyth, 16 Me. 177; *s. c.* 33 Am. Dec. 650. If the creditor

commissioners are held to have a discretion to allow a reasonable time to the subscriber for the payment of this deposit, a subscription will not be deemed void for the reason that payment of the deposit was made in a *draft maturing in thirty days*.[1] Such a subscription is good, even as against those who subsequently apply for shares, and whose applications are rejected for the reason that the shares are all subscribed for, although they actually tender the deposit in cash within the thirty days.[2] But, in the theory of these courts which do not regard the payment of the deposit as a condition precedent to the validity of the subscription, it will not be held void merely because payment was made in a *note maturing at a future time;* and it has been so held even where the charter required the payment of the deposit to be made in cash at the time of the subscription, and declared that the subscription should be void if the deposit were not so paid.[3] Such a note, according to these holdings, is given upon a sufficient *consideration*, and is enforceable.[4]

§ **1221. Whether Payment by Bank Check Sufficient.** — Analyzing further the cases which take this view, we find that one of them has gone to the extreme length of holding that, under a statute requiring payment of the required deposit to be made *in cash*, the payment by many subscribers of their deposits in *check*, drawn upon banks, is void as contrary to the policy of the statute, in such a sense as to prevent the corporation from going into existence for the want of proper payments as a *condition precedent*.[5] But the soundness of a conception which ignores the well known and ordinary habits of business life may well be questioned, though the particular case, upon its peculiar facts, may have been well decided. It is obvious that a provision in the statute under which a corporation is organized, requiring, as a condition precedent to incorporation, that a certain

sues on the original contract, he must produce the note at trial, or prove its loss. Holmes *v.* DeCamp, 1 Johns. (N. Y) 34; *s. c.* 3 Am. Dec. 293; Homes *v.* Smyth. Many other cases are collected on this subject in various notes in the American Decisions.

1 Napier *v.* Poe, 12 Ga. 170.

2 *Ibid.*

3 McRea *v.* Russell, 12 Ired. L. (N. C.) 224.

4 *Ibid;* Vermont Central R. Co. *v.* Clayes, 21 Vt. 30.

5 Crocker *v.* Crane, 21 Wend. (N. Y.) 211; *s. c.* 34 Am. Dec. 228, 234.

amount of stock should be subscribed for and that ten per cent. *in cash* thereof should be paid in good faith, — is complied with by the payment of the ten per cent. in good faith by a *check drawn against sufficient funds* in the hands of a banker, which check would be paid by the banker on presentation.[1] It is equally obvious that it may be made in a check drawn on a solvent banker and certified by the banker as good, where the practice prevails of regarding *certified checks* as equivalent to money.[2]

§ **1222. Simulated Payments by Giving Checks which are not Collected:** — But a payment by a subscriber by a check drawn upon a banker with whom he has no funds to his credit, where the check is never presented for payment, but is long afterwards surrendered to the drawer on a settlement of accounts between him and the corporation, has been held to be not a payment in cash, within the meaning of this statute.[3] And where the check is in fact not paid, and is countermanded by the subscriber before being presented for payment, there is, in the view we are now considering, no binding subscription.[4] It may also be conceded that where the giving of the check is *simulated*, and it is held up in pursuance of an understanding that it will not be presented, it is no payment such as complies with this theory of the law; for it has been justly reasoned that the subscriptions must be real, actual and honest, as distinguished from fictitious, pretended and deceptive; and the payments must be actual payments in cash, not merely parting with the temporary control over the money. Nothing short of actual subscription and actual payment in cash is a compliance with the law; and any attempt to acquire corporate functions by a pretentious or evasive compliance is a fraud.[5] Accordingly, where the charter required the payment of ten per cent. at the time of the subscription, it was held that such payment was not made by the subscriber handing the amount to the treasurer of the corpora-

[1] People *v.* Stockton &c. R. Co., 45 Cal. 306; *s. c.* 13 Am. Rep. 178.

[2] Re Staten Island &c. R. Co., 37 Hun (N. Y.), 422; Compare Thorp *v.* Woodhull, 1 Sandf. Ch. (N. Y.) 411.

[3] People *v.* Chambers, 42 Cal. 201. This was substantially the kind of payment treated of in Croker *v.* Crane, *ante* § 1221.

[4] Excelsior Grain Binding Co. *v.* Stayner, 61 How. Pr. (N. Y.) 456; *s. c.* 25 Hun (N. Y.), 91.

[5] Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242.

tion and immediately receiving it back, on the treasurer giving the subscriber a receipt for so much on account of work to be done by the subscriber for the corporation; and this, although the charter provided that subscriptions might be paid for in work. The State was also a subscriber, and the transaction was challenged by the State as sufficient to release it from its obligation under its subscription; but it was held that, if done without actual fraud and affirmed by the State directors, the State would be bound by its subscription.[1]

§ 1223. Further as to the Manner of Payment. — As in any other case of payment, the payment of the deposit that is required may be made for the subscriber by a *third person*, even though acting officiously, if his act is *ratified* by the subscriber.[2] It may be made in *services*, such as the corporation under its charter has power to receive and at a fair valuation.[3]

§ 1224. View that the Payment of Such a Deposit is not Necessary.— Other courts take the view that, although the charter or governing statute provides that a certain percentage of the sum subscribed, or a certain round sum shall be paid by the subscriber at the time of the subscription, the non-payment of this installment or deposit does not render the subscription void;[4] but

[1] State *v.* Jefferson Turnpike Co., 3 Humph. (Tenn.) 305.

[2] Mississippi &c. R. Co. *v.* Harris, 37 Miss. 13. Compare Ogdensburg &c. R. Co. *v.* Frost, 21 Barb. (N. Y.) 541.

[3] Beach *v.* Smith, 30 N. Y. 116; affg. *s. c.* 28 Barb. (N. Y.) 254. In this case S. subscribed for $500 of stock in a railroad company, upon the understanding that the first 10 per cent. required by law to be paid in cash on subscribing, should be paid by his services in procuring subscriptions and right of way. He subsequently presented an account against the company for services, from which it appeared that, at the date of the subscription, the company was indebted to him in an amoun greater than the cash payment required, in which account he applied and credited $50 for 10 per cent. upon his subscription, and $50 for the first call made thereon. The account was allowed by the company, and the balance paid to S. It was held that this was a sufficient compliance with the statute in respect to the payment of the first 10 per cent. and made the subscription obligatory upon S. As to payment of shares in property or services, see *post*, §1604, *et seq.*

[4] Union Turnpike Co. *v.* Jenkins, 1 Caines (N. Y.), 381, 390; Abbott *v.* Aspinwall, 26 Barb. (N. Y.) 202; Chaffin *v.* Cummings, 37 Me. 76, 83; Chesley *v.* Pierce, 32 N. H. 402;

that *subsequent payment* will operate as a *waiver* of the condition, and the party making it will be considered as recognizing his original liability.[1] In the view of these courts, the failure of the subscriber to pay upon his subscribing the sum required as a deposit by the terms of the governing statute and contract of subscription cannot be set up by him as a defense to an action for calls, since he can not be allowed thus to take advantage of his own wrong. "Even if the commissioners might have refused to receive the stock unless the payment had been made, yet, as they did not do it, the contract was, after the stock had been received without the payment, binding upon both sides."[2] As

Haynes *v.* Brown, 36 N. H. 545, 563; McEuen *v.* West London &c. Co., L.R. 6 Ch. 655; East Gloucestershire R .Co. *v.* Bartholomew, L.R. 3 Ex. 15; Purdey's case, 16 W. R. 660; Beach *v.* Smith, 28 Barb. (N. Y.) 254; Black River &c. R. Co. *v.* Clark, 25 N. Y. 208; Haywood Plank-road Co. *v.* Bryan, 6 Jones L. (N. C.) 82; Hall *v.* Selma &c. R. Co., 6 Ala. 741; Thorp *v.* Woodhull, 1 Sandf. Ch. (N. Y.) 411; Vicksburg &c. R. Co. *v.* McKean, 12 La. An. 638; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Smith *v.* Plank-road Co., 30 Ala. 650; Lake Ontario &c. Co. *v.* Mason, 16 N. Y. 451; Rensselaer &c. Co. *v.* Barton, 16 N. Y. 457, note; Spear *v.* Crawford, 14 Wend. (N. Y.) 20; *s. c.* 28 Am. Dec. 513; Minneapolis &c. R. Co. *v.* Bassett, 20 Minn. 535; *s. c.* 18 Am. Rep. 376; Henry *v.* Vermillion &c. R. Co., 17 Oh. 187; Vermont Central R. Co. *v.* Clayes, 21 Vt. 35; Mitchell *v.* Rome &c. R. Co., 17 Ga. 575, 591; Chamberlain *v.* Plainsville &c. R. Co., 15 Oh. St. 225; Ashtabula &c. R. Co. *v.* Smith, 15 Oh. St. 328; Illinois River R. Co. *v.* Zimmer, 20 Ill. 654.

[1] Beach *v.* Smith, 28 Barb. (N. Y.) 254; Black River &c. R. Co. *v.* Clarke, 25 (N. Y.) 208; affg. *s. c.* 31 Barb. (N. Y.) 258; Haywood Plank Rd. Co. *v.* Bryan, 6 Jones L. (N. C.) 82; Hall *v.* Selma &c. R. Co., 6 Ala. (N. S.) 741; Eastern Plank Rd. Co. *v.* Vaughn, 20 Barb. (N. Y.) 155; Ryder *v.* Alton &c. Co., 13 Ill. 516; Pittsburg &c. R. Co. *v.* Applegate, 21 W. Va. 172; Blair *v.* Rutherford, 31 Tex. 465; Mitchell *v.* Rome R. Co., 17 Ga. 574. Compare Magee *v.* Badger, 30 Barb. (N. Y.), 246; Fiser *v.* Miss. &c. R. Co., 32 Miss. 359; Barrington *v.* Miss. &c. R. Co., 32 Miss. 763; Klein *v.* Alton &c. R. R. Co., 13 Ill. 514. It has been held that if the subscriber is also one of the persons to whom the subscription is to be paid, its non-payment does not render it void. Ryder *v.* Alton &c. R. Co., 13 Ill. 521. It has been so held, although the charter recited that the commissioners should "receive no subscriptions to said stock, unless five per cent. thereof in cash shall be paid to them at the time of subscribing, and should they receive subscriptions to said stock without payment, they shall be personally liable to pay the same to said corporation when organized." This clause was held not a condition precedent to the organization of the company, but a mere personal liability imposed on the commissioners. Blair *v.* Rutherford, 31 Tex. 465.

[2] Wight *v.* Shelby R. Co., 16 B. Monr. (Ky.) 4; *s. c.* 63 Am. Dec. 523.

already seen,[1] reasons of *public policy* have been invoked in support of the conclusion that the payment of such installment or deposit is a *condition precedent.* But there are reasons of public policy which operate quite as strongly the other way. A subscription will operate just as effectively to deceive the public into subscribing for other shares, or giving credit to the corporation, whether the statutory earnest-money is paid or not.

§ **1225. A Similar View in England.** — The English courts have proceeded on a similar view. Thus, where the act of Parliament creating a company provided that the company should not *issue* any share under the authority of that act, nor should any share *vest* in the person accepting the same, until one-fifth of the amount of the share was paid up, it was held that the word *issue* referred to the issuing of *certificates* of shares, and the word *vest* to the vesting of shares, so as to be property and capable of transfer; but that the section did not make the payment of one-fifth a condition precedent to the liability, as a shareholder, of the person accepting the share.[2]

§ **1226. Subscription Valid though Payment Made at a Subsequent Time.** — Where this theory prevails the payment need not be contemporaneous with the subscription; but if the subscriber pay the deposit before the subscription books are closed he will be held to the payment of the residue, though he did not pay the deposit at the time of subscribing.[3] It has been reasoned that the commissioners appointed under an act of the legislature to take subscriptions for the purpose of organizing a corporation are *public agents;*[4] that the statute is in the nature of a power of attorney to them; and that the authority thereby conferred includes the right to exercise the usual and appropriate means to accomplish the purpose of the agency. When, therefore, the statute in terms recited that the subscription should be *bona fide*, and required the commissioners to receive ten per

[1] *Ante*, § 1217.

[2] East Gloucestershire R. Co. . Bartholomew, L. R. 3 Ex. 15; Purdey's case, 16 W. R. 660; McEuen *v.* West London &c. Co., L. R. 6 Ch. 665.

[3] Klein *v.* Alton &c. R. Co., 13 Ill. 514.

[4] See *ante*, § 44.

cent. thereon in gold or silver, but designated no time for the payment of such deposit, — it was held that the commissioners had *discretion* to allow a *reasonable time*.[1] Where the charter of an incorporated company required the payment at the time of subscribing of a certain sum on each share by the subscriber, it was held that a payment subsequent to that time, made before the calls for installment, was an *affirmance* of the previous act of subscription and a sufficient compliance with the requirements of the charter.[2] Where, under a similar charter, the subscriber failed to pay the deposit at the time of subscribing, but a *judgment* was afterwards rendered against him therefor, which he *satisfied*, it was held that he could not object to a suit brought for other assessments, that he did not pay the five per cent. in cash when he subscribed." [3]

§ 1227. Invalidity of Secret Agreement that the Check Shall not be Paid. — On grounds which we shall more fully consider hereafter,[4] where a subscription is merely colorable, made to induce others to subscribe, and with a secret understanding between the subscriber and the agent or promoter who receives the subscription, that it shall not be enforced, the law, on grounds of public policy and to prevent fraud, holds the subscriber to his ostensible agreement and discharges the secret condition. When, therefore, the subscriber gave his check to the agent of the corporation for the sum of $1,000, being the amount of the deposit of ten percentum of his subscription required by the statute to be paid in cash, but with a secret understanding with the agent that he should neither be required to pay the check nor to pay for the shares, which agreement the agent had no authority to make, it was held that the company could maintain an action upon the check.[5]

§ 1228. Subscription Void for Non-Payment of Deposit Made Good by Estoppel. — The injustice and inconvenience of a rule

[1] Napier *v.* Poe, 12 Ga. 170.

[2] Barrington *v.* Mississippi &c. R. Co., 32 Miss. 370.

[3] Hall *v.* Selma &c. Railroad, 6 Ala. 741.

[4] *Post*, §§ 1311, 1400.

[5] Syracuse &c. R. Co. *v.* Gere, 6 Thomp. & C. (N. Y.) 636; *s. c.* 4 Hun (N. Y.), 392. Compare Crocker *v.* Crane, 21 Wend. (N. Y.) 211; *s. c.* 34 Am. Dec. 228; *ante*, § 1221.

which allowed the subscriber to set up his own delinquency for the purpose of escaping the liability which he had assumed by his subscription, was such as drove some of the courts to a way out of the difficulty by another road, — a thing which often happens in judicial proceedings. They have held that, although the subscription was originally void because of the failure to pay, at the time of making the subscription, the deposit required by the governing statute, yet the subscriber, who subsequently *acted as a corporator*, became thereby estopped from denying his liability to pay for his stock and from controverting the validity of his subscription, after thus exercising the rights and privileges conferred by it.[1] Again, although the subscriber may not have paid at the time of his subscription the deposit of ten per cent. required by the governing statute to be paid at that time, yet where he *subsequently paid* that much and more,—*e. g.*, forty per cent. of his subscription, it was held that it was thereby made valid.[2] So also if the subscriber gives a *note* for his subscription, maturing at a future day, and the company *disposes of the note* before maturity to an innocent taker without notice, and he collects it from the maker after a litigation, this will validate the subscription under the same statute.[3] The Supreme Court of Pennsylvania, which was one of the first courts to hold that the payment at the time of the subscription of the deposit required by the statute was a condition precedent to its validity,[4] has finally fallen into line with the prevailing doctrine,[5] so far as to hold that, while a subscription without the payment of the required deposit is provisional only and not binding before the articles of association are filed, so that the subscriber may withdraw before that time,—yet if he suffers his name to remain subscribed to the articles until the articles are filed, his subscription becomes final, and he cannot afterwards withdraw nor set up his omission to pay the required deposit against his associates.[6]

[1] Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.), 364; Erie &c. R. Co. *v.* Brown, 25 Pa. St. 156; Selma &c. R. Co. *v.* Tipton, 5 Ala. 787; *s. c.* 39 Am. Dec. 344, 356.

[2] Black River &c. R. Co. *v.* Clarke, 25 N. Y. 208.

[3] Ogdensburgh &c. R. Co. *v.* Wooley, 3 Abb. App. Dec. (N. Y.) 398; *post*, § 1657; *Ante*, 1220.

[4] *Ante*, § 1217.

[5] *Ante*, § 1224.

[6] Garrett *v.* Dillsburg &c. R. Co., 78 Pa. St. 465.

In *Canada* it has been held that although a statutory provision, requiring payment of ten per cent. by the shareholder within thirty days after his subscription, is a part of his contract to take the shares, it is competent for the parties to *waive* it; and that, where the money has been paid to and accepted by the corporation, and stock *certificates* have *issued* recognizing the party as a shareholder, and *dividends* on the shares have been *paid* to him, both parties (the corporation and the shareholder) are thereby *estopped* from denying that he is a shareholder in the corporation.[1]

§ 1229. Where Subscription Made after the Organization. — The rule which requires the payment of the deposit in order to the validity of the subscription, has been held not to apply where the subscription is made *after* the organization of the corporation, because in such a case the requirement, being for the benefit of the corporation, is one which it may *waive*.[2]

§ 1230. What if the Question Arises under a By-law merely. — Accordingly, where the obligation to pay a deposit at the time of making the subscription is not declared in the charter or governing statute, but in a *by-law* of the corporation merely, the failure to pay the deposit will not avoid the subscription, but will render it voidable only, at the election of the corporation. The corporation may *waive* this by-law, and elect to treat the subscription as valid, and upon its doing so the subscriber will be bound.[3]

§ 1231. Illustration in Case of Surrender and Re-issue of Shares. — A good illustration of this is found in a case where the act

[1] *Re* Central Bank of Canada, 25 Can. L. J. 238, opinion by Hodgins, Master-in-Ordinary; citing and following Day's case, decided by the same judicial officer and afterwards affirmed on appeal. Compare Union Fire Ins. Co. *v.* Shoolbred, 4 Ont. (Can.) 359; Port Whitby &c. R. Co. *v.* Jones, 31 Up. Can. Q. B. 170.

[2] Minneapolis &c. R. Co. *v.* Bassett, 20 Minn. 535; *s. c.* 18 Am. Rep. 376. This was conceded by the Court of Appeals of Maryland in Taggart *v.* Western Maryland R. Co., 24 Md. 563; *s. c.* 89 Am. Dec. 760. So held in the Canadian cases cited in the preceding section.

[3] Piscataqua &c. Co. *v.* Jones, 39 N. H. 481; Smith *v.* Plank Road Co., 30 Ala. 650; McRea *v.* Russell, 12 Ired. L. (N. C.) 224; Blair *v.* Rutherford, 31 Tex. 465.

of incorporation of a banking company required that ten per cent. should be paid to the commissioners on each share of the capital stock at the time of subscribing. As soon as all the capital stock was taken, and ten per cent. thereon paid in, the trustees were to be elected and the company fully organized. Subsequently, an *amendment of the charter* authorized the company, in its discretion, to allow any stockholder to surrender his certificate of capital stock, and take a certificate of full paid stock equal to the amount of payment on the stock surrendered, and the company were to hold or re-issue such overplus stock. It was held that the company were not bound to require of the purchasers of this surrendered stock a payment of ten per cent. on each share of their purchase. The terms of the original charter had exclusive reference to subscribers before the corporation was organized, and before it had existence; and the amendatory act gave the company, and not the commissioners, the right of re-issuing its surrendered stock.[1]

§ 1232. Effect of Statutes Requiring a Certain Amount to be Paid in before Commencing Business. — Statutes requiring a certain amount of the capital stock of a corporation to be paid in before it shall commence business, stand on a similar footing to those requiring the payment by subscribers of a certain percentage of their subscriptions at the time when their subscriptions are made. The non-compliance with such a charter or statutory provision cannot be set up either by the corporation nor by the stockholders, to avoid a liability resting upon them.[2]

[1] Social Life Ins. &c. Co. *v.* Lanier, 5 Fla. 110; *s. c.* 58 Am. Dec. 448.

[2] Johnston *v.* Southwestern &c. Bank, 3 Strobh. (S. C.) Eq. 263. Compare Patterson *v.* Wyomissing &c. Co., 40 Pa. St. 117.

ARTICLE IV. THEORY THAT THE FULL AMOUNT OF THE CAPITAL MUST BE SUBSCRIBED.

§ 1235. Shareholder not Liable Until Full Amount Subscribed. — Where the act of incorporation,[1] or the articles of association,[2] or certificate of incorporation,[3] or subscription agreement,[4] or in England the prospectus which is published to induce subscriptions to the stock of the projected company,[5] fixes its capital at a certain sum, divided into shares of a specified amount, a subscriber cannot be required to pay assessments until the amount so fixed has been fully and *bona fide* subscribed, unless, by taking part in the organization of the corporation or otherwise, he has *waived* his rights in the premises or *estopped*

[1] Contoocook Valley R. Co. *v.* Barker, 32 N. H. 303; People *v.* National Savings Bank, 129 Ill. 618; *s. c.* 22 N. E. Rep. 288; Masonic Temple Asso. *v.* Channell 43 Minn. 353; *s. c.* 45 N. W. Rep. 716.

[2] Rockland &c. Steamboat Co. *v.* Sewall, 78 Me. 167; *s. c.* 3 Atl. Rep. 181; 1 New Eng. Rep. 791; 4 East. Rep. 621; Bray *v.* Farwell, 81 N. Y. 600 (overruling, it seems, Plank Road Co. *v.* Wetzell, 21 Barb. (N. Y.) 156); Allman *v.* Havana &c. R. Co., 88 Ill. 521.

[3] Haskell *v.* Worthington, 94 Mo. 560.

[4] People's Ferry Co. *v.* Balch, 8 Gray (Mass.), 303; Rockland &c. Steamboat Co. *v.* Sewall, 78 Me. 167; Santa Cruz R. Co. *v.* Schwartz, 53 Cal. 106. It has been held no defense in an action for calls that the full amount of capital stock contemplated in the agreement of subscription has not been subscribed, provided the amount required by the governing statute has been so subscribed. Hamilton &c. Plank Road Co. *v.* Rice, 7 Barb. (N. Y.) 157.

[5] Pitchford *v.* Davis, 5 Mees. & W. 2; Galvanized Iron Co. *v.* Westoby, 16 Jurist, 892; Martin B., in Howbeach Coal Co. *v.* Teagler, 6 Jurist (N. S.), 275; *s. c.* 5 Hurl. & N. 151; European &c. R. Co. *v.* McLeod, 1 Pugsley (N. B.), 314, per Weldon, J.

himself from setting up this defense.[1] Until then his subscription is deemed to be *conditional* merely. The reason of the rule is plain. He is invited to become a subscriber to a venture to be commenced and carried on by means of a certain capital, divided into a certain number of shares, and he cannot be compelled against his will to be a contributor to a venture commenced and carried on with a smaller capital or a smaller number of shares. The rule has been held otherwise where the question arose collaterally, and under a charter couched in such terms as not to disclose a clear legislative intention to make the subscription of the whole capital stock a condition to the corporate existence.[2]

§ 1236. Illustration: Subscription on Condition that "Sufficient is Subscribed for the Purpose." — Upon a contract in writing, by which subscribers "agree to pay the sums set against their respective names, to such persons as shall be authorized to receive the same, for the establishment and support of a new ferry from East Boston to Boston, the location of which shall be determined by the committee recently appointed at a meeting of the citizens, provided sufficient is subscribed for the purpose, the same to be represented by the certificates of stock to be created by the company hereafter to be organized," — a corporation established after the date of the agreement can not maintain an action, against one who subscribes it after such organization, for the amount of his subscription; at least until a sufficient sum has been subscribed to pay for all lands, structures, and boats of the ferry, free of incumbrances.[3]

§ 1237. Instance of a Faulty Instruction Submitting this Question to the Jury. — In an action by a corporation against a subscriber for an assessment the court instructed the jury to the effect that, "where an act of incorporation fixes the amount of the capital stock, and the number of shares into which it shall be divided, the corporation can make no assessment, nor call upon the stockholders, until

[1] Hale *v.* Sanborn, 16 Neb. 1; Temple *v.* Lemon, 112 Ill. 51. Compare Penobscot R. Co. *v.* White, 41 Me. 572; *s. c.* 66 Am. Dec. 257, and Boston &c. R. Co. *v.* Midland R. Co., 1 Gray (Mass.), 368. The general statutes of Minnesota abrogate this rule. Masonic Temple Asso. *v.* Channell, 43 Minn. 353; *s. c.* 45 N. W. Rep. 716.

[2] Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46, 65.

[3] Peoples Ferry Co. *v.* Balch, 8 Gray (Mass.), 303.

the stock has been subscribed, unless either expressly or by implication a different intent appears in the charter or in the subscription. And if they believe that the act incorporating plaintiff's company required the sum of $300,000 to be paid in before any call could be made upon the subscribers, and plaintiff had failed to show that this had been done, they must find for defendant." It was held that this instruction was faulty, in submitting to the jury the legal construction of the plaintiff's charter, the legal effect of written instruments being a question for the court, and not for the jury; and in raising the question whether the company was duly organized, which could only be done by a plea under oath, denying the character assumed.[1]

§ 1238. Subscriptions by Insolvents, Persons not Sui Juris, etc.—The principle of the foregoing section will obviously apply where the commissioners, promoters, or others having control of the subscription list accept in bad faith, idiots, lunatics, married women (where the common law disabilities of married women prevail), or persons who are notoriously insolvent. But, in view of the policy and necessity of holding solvent subscribers to their engagements, the courts have admitted defenses of this kind sparingly and with great caution. It has been held no defense to an action by creditors that some of those who were accepted as subscribers, were notoriously insolvent at the time.[2] Another court has held that it is not a good defense to such an action that the corporation had accepted subscriptions from persons who were not pecuniarily responsible, and who were reputed to be not responsible for the amount for which they subscribed,—subject, however, to the qualification that the defendant might offer any evidence tending to show that these subscriptions were not made in *good faith*. The court sanctioned the principle that the subscriber cannot be held to his contract of subscription, until the least sum required by the charter should be subscribed.[3] This was in accordance with what the same court had ruled in a previous case, that "if the company obtains subscriptions to the amount required, in good faith, from persons apparently able to pay or to procure

[1] Selma &c. R. Co. *v.* Anderson, 51 Miss. 829.

[2] Jewell *v.* Rock River Paper Co., 101 Ill. 57.

[3] Penobscot &c. R. Co. *v.* White, 41 Me. 512; *s. c.* 66 Am. Dec. 257.

others to pay for the shares, it could not have been the intention to render its proceedings illegal and void, if those subscriptions should finally prove to be of little value.[1] The court added to this the observation that "if the corporation should, for the purpose of making up the amount of stock required before an organization, accept a list of subscribers and shareholders which was composed in part of idiots or town paupers, as suggested by the counsel for the defense, such a subscription would not be a compliance with the provisions of the charter; but if, on the other hand, the list appeared to the company to consist of names which might be relied on for the fulfillment of the subscription, they would be justified in proceeding to organize, and their proceedings would be valid, even though it might subsequently be made to appear, that some of the subscribers, at the time, were not of sufficient pecuniary responsibility to pay for their stock, and were not reputed to be so, provided the corporation acted in good faith on their part in the acceptance of such list. From the very nature of the contract of subscription, it must have been within the contemplation of the parties that the shareholders or corporators should determine who were apparently responsible as subscribers; and when they had done so in good faith, the subscribers to the stock must be regarded as bound by such decision. The reputation or fact of pecuniary inability could, at most, only be *evidence* upon the question of good faith, and for that purpose the defendant was permitted to prove them if he desired."[2] Another court regarded it as not a good defense to such an action that certain small subscriptions were void because made by *married women*, the defendant having subscribed *after* these married women and with a knowledge of their subscriptions.[3]

§ 1239. Subsequent Declaration of Subscriber Inadmissible. — On the soundest principles, the subsequent declaration of a subscriber to the effect that his subscription was *colorable* and not made in good faith, will not be admitted, in an action against

[1] Penobscot &c. R. Co. *v.* Dummer, 40 Me. 172; *s. c.* 63 Am. Dec. 654.

[2] Penobscot R. Co. *v.* White, 41 Me. 512; *s. c.* 66 Am. Dec. 257, 262.

[3] Cornell's Appeal, 114 Pa. St. 153. See *ante*, § 1096 *et seq.*

another subscriber for calls, for the purpose of showing that such was the fact, in order to create a defense within the rule stated in the preceding paragraph.[1]

§ 1240. View that the Judgment of the Commissioners is Conclusive. — Where the commissioners appointed to receive the subscriptions are vested with the power of deciding when the requisite amount has been *bona fide* subscribed, and of certifying that fact to the secretary of state, who is thereupon required to issue a certificate that the corporation has been organized, the decision of the commissioners upon the point named is deemed conclusive, and consequently the certificate issued by the secretary of state is deemed conclusive evidence of the fact that the corporation has been duly organized.[2] The theory of this holding is that found in the following observation of Lord Tenterden: "If a matter is left to the discretion of any individual, or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether or not they have exercised their discretion properly or not. If such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power to the best of his judgment." [3]

§ 1241. Taking Subscription in Property at Excessive Valuation. — A just principle would seem to avoid the *bona fide* subscriptions taken where those in charge of the subscription list fraudulently accept subscriptions in specific property at grossly excessive valuations; [4] though in the era of early railroad building when some of the western courts seem to have been strangely affected in favor of the railroad companies, even this was held to be no defense.[5]

[1] Penobscot R. Co. *v.* White, 41 Me. 512; *s. c.* 66 Am. Dec. 257.

[2] Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181, 186.

[3] Rex *v.* Mayor &c. of London, 3 Barn. & Adolph. 271. See in support of the same doctrine, Walker *v.* Devereux, 4 Paige (N. Y.), 229; Rex *v.* Justices of Norfolk, 1 Nev. & M. 67; Clarke *v.* Brooklyn Bank, 1 Edw. Ch. (N. Y.) 361, 371.

[4] *Post*, § 1608.

[5] Maccoun *v.* Indiana &c. R. Co., 9 Ind. 262; Hornaday *v.* Lane, 9 Ind. 263. No opinion was written in either of these cases.

§ 1242. Waiver of Right to Object on this Ground. — But, as already suggested,[1] the subscriber may waive his right to defend against the action on his subscription on this ground; and here, as in other cases,[2] he may *estop* himself from showing that the corporation has been illegally organized, by his conduct in participating in its organization, or otherwise. Any acts done by him, either as a corporator, or as a director, which evince a willingness on his part that the corporation should enter upon its business with no more stock than that already subscribed, will amount to a waiver of the condition that payment of his subscription cannot be required until the whole capital stock is subscribed.[3] So, if a corporation has already commenced business at the time when the subscription is made, and the subscriber knows this fact, and also knows that its whole capital stock has not been taken, a like waiver on his part may be inferred.[4]

Article V. Other Theories and Holdings.

§ 1245. What Agents can Receive Subscriptions. — Where commissioners have been appointed under the charter to take

[1] *Ante*, § 1235.

[2] *Post*, § 1853.

[3] Masonic Temple Asso. *v.* Channell 43 Minn. 353; *s. c.* 45 N. W. Rep. 716.

[4] Musgrave *v.* Morrison, 54 Md. 161. See also Goff *v.* Hawkeye Pump & Windmill Co., 62 Iowa, 691.

subscriptions, after the corporation is organized and a board of directors elected the functions of the commissioners cease, and the directors alone have the power to receive further subscriptions to the stock of the company. But, of course, they may appoint an agent to receive subscriptions, and subscriptions so received will be binding.[1] This, of course, assumes that its stock is not all filled up. The theory here invoked is that receiving subscriptions to the capital stock of a corporation is a *ministerial act*, under a statute authorizing commissioners to take such subscriptions and subsequently to distribute the stock, and that such act may therefore be performed by an *agent* or *deputy*, or by any one without authority whose act is afterwards ratified by the commissioners.[2] But where the governing statute provides for the organization of a corporation and nominates a particular agent, official, or board of commissioners to receive subscriptions to its stock, subscriptions can only be received by such agent, official or board of commissioners, or they will not be binding. The reason is that the statutory direction must be pursued. Thus, if the power of *allotting* shares to applicants is conferred by the governing statute upon the board of *directors*, they cannot *delegate* it to a *committee* of their number, and no valid allotment can be made by such a committee.[3] So, if a statute providing for the organization of railroad companies provides that certain *commissioners*, to be named in the articles of association, shall, *after the corporation is organized*, open books for subscriptions, and keep the same open until the capital has been subscribed, and, in case of an excess of subscriptions, make a distribution among the subscribers,— subscriptions received by an *agent* appointed by the directors will not be binding.[4] The theory is that the commissioners, under such a statute,[5] act as a statutory board, and derive their powers from the law, and not from the corporation;

1 Lohman *v.* New York &c. R. Co. 2 Sandf. (N. Y.) 39.

2 Crocker *v.* Crane, 21 Wend. (N. Y.) 211; *s. c.* 34 Am. Dec. 228.

3 Howard's case, L. R. 1 Ch. 561.

4 Schurtz *v.* Schoolcraft &c. R. Co., 9 Mich. 269, 272. See also Parker *v.* Northern Central &c. R. Co., 33 Mich. 23; Northern Central &c. R. Co. *v.* Eslow, 40 Mich. 222; Essex Turnp. Co. *v.* Collins, 8 Mass. 292. *Contra*, Railroad Co. *v.* Rodriguez, 10 Rich. L. (S. C.) 278. See also cases cited in Mor. Corp., 3d ed., § 65.

5 Here, the general railroad law of Michigan.

and since it is the intent of the law, to enable all persons to subscribe equally, any subscription not made through them, acting regularly in the discharge of their duty, is void for want of mutuality.[1] Therefore, subscriptions taken by an agent appointed by the directors, not being binding, did not operate to prevent other parties from taking the entire amount not subscribed by the original articles, whenever the commissioners should see fit to proceed and perform their duty.[2] But here, as in other cases, although the subscription may not be binding, because procured by an agent having no authority, yet the infirmity of the contract may be cured by a subsequent *ratification*.[3]

§ 1246. Nature of the Authority of Commissioners. — A commissioner appointed by or under a statute to receive subscriptions to the capital stock of a corporation is said to be an agent appointed by the law with a special power of attorney, which power is found in the statute. It follows that, as in the case of other public agents and officers, all who deal with him must look to the source of his authority.[4]

§ 1247. Apportionment of Stock by the Commissioners. — In the days when corporations could only be organized under special charters granted by the legislature, corporate franchises were of great value, and shares in corporate ventures were in many cases subscribed for with great eagerness. This was especially so in the State of New York in the case of banking corporations, which in many cases enjoyed a monopoly of the banking business, which mistaken notions of public policy were interested in protecting; so that informations in the nature of *quo warranto* were frequently exhibited against insurance and

[1] Schurtz *v.* Schoolcraft &c. R. Co., 9 Mich. 269.

[2] *Ibid.* It has been held, contrary to the principle on which this case proceeds, that a subscription to the capital stock of a railroad company is valid, though made to one who was not a commissioner to receive subscriptions, and though made by the subscriber under a mistaken belief that he might forfeit his stock at pleasure. Railroad Co. *v.* Rodriguez, 10 Rich. L. (S. C.) 278.

[3] Walker *v.* Mobile &c. R. Co., 34 Miss. 245; Mobile &c. R. Co. *v.* Yandal, 5 Sneed (Tenn.), 294.

[4] Nippenose Manuf. Co. *v.* Sladon, 68 Pa. St. 256. See also Schurtz *v.* Schoolcraft &c. R. Co., 9 Mich. 269; Napier *v.* Poe, 12 Ga. 170.

other non-banking corporations which assumed to do a banking business.[1] In the eagerness to subscribe for shares in a projected corporation, it often happened that more shares were subscribed for than the aggregate capital stock which the charter allowed the corporation to have. In this state of things disputes naturally arose as to the apportionment of the shares, and the courts were frequently appealed to to settle these disputes. The holdings of the courts in settling these disputes were in most cases influenced by the language of particular charters;[2] but these charters were generally very similar to each other in respect of the steps pointed out for organizing the company. In one case, where the act of incorporation made no provision for the case of an excess of subscriptions over the prescribed capital stock, it was held that the commissioners were impliedly authorized to make an *equitable apportionment* of the stock among all the subscribers; but that they had no power entirely to exclude any of the subscribers, or to take an inordinate proportion of the stock themselves; and where they made an apportionment which the court regarded as unjust, a *re-apportionment* was directed, and the choice of directors in the mean time was restrained by *injunction*.[3] In another case the act incorporating a bank directed the commissioners, in case of an excess of subscriptions, to apportion the stock among the subscribers, as might seem, to a majority of the commissioners, to be most for the interest of the institution; but each subscriber for twenty shares or upwards was to receive at least twenty shares, unless the subscriptions for smaller quantities should exceed the capital stock. The subscriptions for twenty shares and under did exceed the capital stock. It was held that the apportionment of the stock rested in the *uncontrolled discretion* of the commissioners; and that an apportionment made in good faith was valid, though some subscribers received more than twenty shares, to the entire exclusion of others.[4] It was an essential

[1] *Post*, Ch. 152.

[2] That the right of the public to participate in the stock of an incorporated bank depends entirely upon its charter, see State *v.* Bank of Charleston, Dudley (S. C.), 187.

[3] Meads *v.* Walker, Hopk. (N. Y.) 587.

[4] Clark *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361.

premise to the foregoing conclusion that an apportionment of the shares by the commissioners among the subscribers was necessary to each shareholder's title, — in other words, that the contract was not complete for want of mutuality, but remained a proposal merely, until the commissioners made the apportionment. Under this theory no subscriber acquired any interest in the stock of the company as owner, so as to authorize him to transfer, or vote upon it, until the commissioners had apportioned the stock, and designated the stockholders, and the amount each was to receive.[1] It followed from the same theory that a distribution of the stock by a number of commissioners, not sufficient to constitute a quorum or a legal board, was void; and it was therefore held that in such a case an obligation given for the payment of the first installment was void for want of consideration.[2] But, under a statute of South Carolina chartering certain banks, it was held that the commissioners appointed to take subscriptions, had no power, in case of over-subscription to the stock, to apportion it among the subscribers. It belonged to the *corporation* to reduce the subscriptions *pro rata*.[3] There is a curious holding to the effect that if a person, for the purpose of deceiving the commissioners, under an act of incorporation, procures stock to be subscribed for in the name of another person, for his benefit, it will be a fraud upon the commissioners, and upon the law, and the legal title to the stock will vest in the person subscribing, *for the benefit of the corporation.*[4]

§ 1248. Proportion Allowed to the Commissioners Themselves. — The commissioners appointed by the act of incorporation to take subscriptions were, as already suggested, entitled to reserve a reasonable quantity to themselves;[5] but where the act of incorporation provided that no one of the commissioners for taking subscriptions should be allowed more than a certain quantity, — it was held that they were entitled to that quantity,

[1] Walker *v.* Devereaux, 4 Paige (N. Y.), 229.

[2] Crocker *v.* Crane, 21 Wend. (N. Y.) 211; *s. c.* 34 Am. Dec. 228.

[3] State *v.* Lehre, 7 Rich. (S. C.) 234.

[4] Walker *v.* Devereaux, 4 Paige (N. Y.), 229.

[5] Meads *v.* Walker, Hopk. (N. Y.) 587; Walker *v.* Devereaux, 4 Paige (N. Y.), 229.

though the subscriptions greatly exceeded the authorized capital stock.[1]

§ 1249. Remedy of the Subscriber for Refusal to Issue Shares. — In the case of the unjust apportionment of the shares, or of a refusal to issue the shares for which a party has subscribed, his remedy, if he has any, is in equity; and we have already referred to a case where a re-apportionment was directed and the election of directors was in the meantime restrained by injunction.[2] It has been held that where a corporation issues *new stock*, to be distributed among its existing stockholders in proportion to their respective holdings, — which is the case with what is termed a "stock dividend,"[3] if the directors refuse to issue to a particular shareholder his due portion of the new stock, he may maintain an action in equity to compel its issue, so long as unissued stock remains which may be applied to the purpose, and that he may also maintain an action for damages for the refusal; and further, that such an action should be brought by each individual stockholder who is thus injured, since the rights and obligations of stockholders are several and not joint;[4] that it should not be brought in behalf of the plaintiff and all other stockholders who may come in; and that it should be brought against the corporation, and not against the directors as individuals.[5] It has been held, in such a case, that the stockholder cannot maintain an action against the corporation for refusing to permit him to subscribe for the new stock, without first proving that he demanded and offered to subscribe for such stock.[6] Subscribers who have not paid the *deposit* required by the charter or governing statute, in the case of subscribers to the stock of a projected corporation, have, in the view of one court, no standing in equity to undo an illegal organization of the corporation by their co-subscribers.[7] If their co-adventurers illegally organize the

[1] Clark *v.* Brooklyn Bank, 1 Edw. (N. Y.) 361.

[2] Meads *v.* Walker, Hopk. (N. Y.) 587.

[3] *Post*, § 1079.

[4] *Ante*, § 1079.

[5] Dousman *v.* Wisconsin &c. Mining Co., 40 Wis. 418.

[6] Wilson *v.* Bank of Montgomery County, 29 Pa. St. 537; see further Smith *v.* Chicago &c. R. Co., 18 Wis. 17; Miller *v.* Illinois &c. R. Co., 24 Barb. (N. Y.) 312.

[7] *Ante* § 1235, *et seq.*

corporation and illegally elect a treasurer, they cannot have any relief against them in equity, because they have not paid the first installment to the treasurer so illegally elected. If a minority of the subscribers, a number not sufficient under the terms of the charter to organize the corporation, meet by themselves and assume to organize it, the objecting subscribers have no standing in equity to have the wrong undone, because they are estopped to deny the validity of the corporate organization, in a case where they have never admitted it, where they are not proceeding against the supposed corporation, and where the very foundation of their proceeding involves a denial of it.[1]

§ 1250. Apportionment on Incorporating a Mining Property. — Upon the incorporation of a mining or other property, owned by several persons in common, each of the co-adventurers will be entitled to a proportion of the stock corresponding to his interest in the property, unless the constating instrument clearly excludes that conclusion and establishes a different rule of apportionment. Thus, upon the organization of a mining corporation by the owners of undivided third interests in mining property which they conveyed to the corporation in payment of all its stock, the certificate of incorporation, providing that the stock was to be "divided *half and half* between the parties," was construed to mean that each owner and incorporator was entitled to *one-third* of the stock.[2]

§ 1251. Subscription Void after All Stock Taken. — This leads us to inquire what will be the effect of a subscription made after all the stock has been subscribed for. A corporation cannot increase its stock at will, in any manner or to any extent, unless it is authorized to do so by its charter or by the governing statute, and then only in the manner prescribed.[3] When a corporation has issued valid shares to the full extent of all the shares which by its constitution or by the general law it is empowered to issue, no court can order it to issue others, because in that

[1] Busey *v.* Hooper, 35 Md. 15; *s. c.* 6 Am. Rep. 350, 359.

[2] Bates *v.* Wilson, 14 Colo. 140; *s. c.* 24 Pac. Rep. 99.

[3] Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432; *post*, § 2079.

respect its powers have been exhausted.[1] When all the stock of a corporation is once subscribed for and taken, the corporation cannot issue any more unless it shall get back a portion of that which has been taken, by forfeiture or otherwise;[2] and no person can then become a shareholder and as such liable to creditors of the corporation, except by purchase from the original subscriber, or his assignee, and by having the stock transferred to him.[3] It was hence held, where all the stock of a corporation was subscribed for and taken at the time the articles of incorporation were filed, and the certificate of incorporation, made and filed as required by law, specified the names of all the stockholders, and there was no evidence that the corporation had come into possession of any of its stock by forfeiture or otherwise, — that no subsequent subscribers, by merely writing their names in the corporation book and affixing a number of shares to their respective names, could acquire a right to any share of its stock, or become by such act stockholders of the corporation, and, as such, liable for its debts. Nor does such a subscription for stock, where there is none to issue, *estop* the subscriber, when proceeded against by creditors of the corporation, from denying the relation of stockholder.[4] The foregoing observations have no reference to the case mentioned in the preceding section, where the commissioners appointed by and under an act of incorporation are empowered to *apportion* the shares among the subscribers; though it will manifestly apply after the apportionment has been made and the stock has thus been filled up with valid subscriptions which have been accepted by the commissioners.[5]

§ 1252. Instances of Insufficient Subscriptions. — A subscription by one of several *heirs*, as follows, — "Estate of A., 100 shares

[1] Smith *v.* North American Mining Co., 1 Nev. 428; Mechanics' Bank *v.* New York &c. R. Co., 13 N. Y. 599.

[2] See Evans's Case, L. R. 2 Ch. 427; *post*, § 2080.

[3] Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432.

[4] Lathrop *v.* Kneeland, 46 Barb. (N. Y.) 432. To the same effect is Mackley's Case, L. R. 1 Ch. 247.

[5] A subscriber to the stock of an insurance company, the paper subscribed referring to a previous subscription of $40,000, not then paid in, as being part of the full sum of $300,000, to be subscribed, thereby has *notice* of such fact, and also of the fact that such sum of $40,000, is to be taken as part of the full subscription. New York &c. R. Co. *v.* De Wolf, 5 Bosw. (N. Y.) 593.

$10,000," — binds neither him nor his co-heirs, as the statute provides that the associates shall severally subscribe.[1] - - - - In connection with a conditional contract with Y. to continue him as employé, a corporation drew up a certificate of stock to Y., which it retained in the stock-book, and indorsed thereon a receipt by it for him. It was held that there was no delivery of the certificate, and that Y. acquired no rights thereby; although owning no other stock, he had been allowed to vote in meetings of the stockholders.[2] - - - - Several persons signed a paper purporting to be an agreement to take stock in a corporation, which, as the paper recited, was about to be formed. Afterwards the paper was signed by the president and secretary, and the corporate seal was affixed, and an action was brought to recover from one of the subscribers the price named in the paper. The complaint did not state when the company was incorporated, and it was not shown that any of the subscribers joined in its formation or membership, or was authorized to sell any of the stock. It was held that the action could not be maintained, for want of mutuality under the civil code of California.[3]

§ 1253. Subscription Delivered as an Escrow.— A subscription cannot be delivered as an escrow to commissioners appointed to receive subscriptions for the corporation, to take effect only on a specified condition; but the subscription becomes absolute when delivered to such persons, and the non-performance of the condition is no defense in an action for calls. "The well settled doctrine is that, to make a writing an escrow merely, it must be placed in the hands of a *third person* by the party making it, to be delivered to the other party on the happening of a specified contingency. Here the subscribers were the parties on the one side, and the commissioners on the other."[4] But it has been held that a

[1] Troy &c. R. Co. *v.* Warren, 18 Barb. (N. Y.) 310.

[2] York *v.* Passaic Rolling Mill Co., 30 Fed. Rep. 471.

[3] California Sugar Manuf. Co. *v.* Schafer, 57 Cal. 396; Cal. Civ. Code, §§ 343, 344.

[4] Wright *v.* Shelby Railroad Co., 16 B. Monr. (Ky.) 4; *s. c.* 63 Am. Dec. 522. That a *deed* cannot be *delivered* to the grantee or his agent on condition that it shall operate as an *escrow* merely, and take effect upon a subsequent condition, but that the deed takes effect absolutely upon such delivery, see the following authorities: Fairbanks *v.* Metcalf, 8 Mass. 238; Gilbert *v.* Insurance Co., 23 Wend. (N. Y.) 45; *s. c.* 35 Am. Dec. 543; Clark *v.* Gifford, 10 Wend. (N. Y.) 313; Worrall *v.* Munn, 5 N. Y. 229; *s. c.* 55 Am. Dec. 330; Foley *v.* Cowgill, 5 Blackf.

delivery may be made to a *director* of the corporation in *escrow*, to become binding only on the happening of a certain condition; so that if the director delivers it to the corporation without the happening of such condition, it will not be binding.[1] In another case a committee was appointed by the inhabitants of a town, to obtain subscriptions to the stock of a railroad company, which were to be delivered to the company only upon certain parol conditions. It was held that a member of the committee, acting as such, was not an agent of the railroad company in

(Ind.) 18; *s. c.* 32 Am. Dec. 49; Hicks *v.* Goode, 12 Leigh (Va.), 479; Ward *v.* Lewis, 4 Pick. (Mass.) 520; Lawton *v.* Sager, 11 Barb. (N. Y.) 351; Cocks *v.* Barker, 49 N. Y. 110; Braman *v.* Bingham, 26 N. Y. 491; Berry *v.* Anderson, 22 Ind. 39; Seymour *v.* Cowing, 1 Keyes (N. Y.), 535; *s. c.* 4 Abb. App. (N. Y.) 204; Brackett *v.* Barney, 28 N. Y. 341; Beers *v.* Beers, 22 Mich. 44; Madison &c. Co. *v.* Stevens, 10 Ind. 2; Deardorff *v.* Foresman, 24 Ind. 485; Co. Litt. 36a: Shep. Touch. 58, 59. The practical meaning of the rule is that parol evidence qualifying a delivery of the deed to the grantee or to his authorized agent is inadmissible. Stephens *v.* Buffalo &c. R. Co., 20 Barb. (N. Y.) 339; Cocks *v.* Barker, 49 N. Y. 110. But, on the contrary, if it is intended that the deed shall take effect upon conditions, those conditions must be written in or upon the deed. Berry *v.* Anderson, 22 Ind. 39. But it has been held that leaving a deed in the hands of a grantee, to be by him transmitted to a third person, to hold in escrow until the happening of a certain event, is not a delivery to the grantee, so as to vest title in him. Gilbert *v.* Insurance Co., 23 Wend. 43; *s. c.* 35 Am. Dec. 543. It is only where the deed is delivered to the grantee or to his authorized agent, with intent to part with it as a deed and that it shall ultimately take effect as a deed, that this rule applies. If the deed is delivered without this purpose the law will not disappoint the intention of the parties and hold the delivery absolute. Dietz *v.* Farish, 12 Jones & S. (N. Y.) 252; *s. c.* 53 How. Pr. (N. Y.) 223; Brackett *v.* Barney, 28 N. Y. 341. Another distinction suggested is that the rule applies only to those forms of deeds which convey an *estate*, and not to those, such as bonds, which convey merely a right of action. Campbell, J., obiter, in People *v.* Bostwick, 32 N. Y. 447. But this distinction seems not to be sound, and the contrary was decided in Cocks *v.* Barker, 49 N. Y. 110, and in Foley *v.* Cowgill, 5 Blackf. (Ind.) 18; *s. c.* 32 Am. Dec. 49.

[1] Ottawa &c. R. Co. *v.* Hall, 1 Bradw. (Ill.) 612. In this case a person subscribed to the capital stock of a railroad company, and delivered the subscription to a director in escrow, not to be delivered to the corporation unless a certain county failed to vote therefor. It was held: 1. That, without proof of such failure, there could be no valid delivery to the corporation, and no recovery on the subscription. 2. That a vote regularly adjudged void was not such failure. 3. That the delivery to the director was not a delivery to the corporation, he not being an agent to receive the agreement. 4. That the condition of the delivery could be shown by parol evidence.

such a sense as to prevent his receiving the subscription list as an *escrow;* and if he delivered it to the company without the consent of the subscribers, and without a fulfillment of the conditions, such delivery was not binding.[1]

§ 1254. Distinction between Subscriptions and Purchases of Shares. — A distinction has been taken between a subscription to the capital stock of a corporation and a purchase of its shares from the corporation.[2] Thus, where a *contractor* agreed to build a railroad, and to accept in payment a certain amount of its capital stock, the agreement was a *purchase*, and not a subscription.[3] A contract to take shares of a company is not discharged by *purchasing* the same number of paid-up shares *of another member*; for this is taking shares from another member, and not from the company. Thus, where M. subscribed the memorandum of a company for five shares, and, eight months afterwards, five fully paid-up shares, which the company had agreed to allot to C. as part of the purchase-money of property sold by them to C., were, by C.'s direction, allotted to M., and the company was wound up, it was held that M. was a contributory in respect of five shares on which nothing had been paid.[4]

§ 1255. Promise to Take and Pay for Stock in Unincorporated Company Actionable. — A promise to take and pay for stock in an unincorporated joint-stock association may be enforced by an action at law by the trustees to whom the promise is made, although the plaintiffs and defendants, being members of the same association, are in a legal sense partners.[5] The principle is that one partner may sue another upon a contract to make specific advances for the purpose of launching the partnership.[6] But it is only an *express promise* to contribute to the common stock or to make advances thereto that can be

[1] Beloit &c. R. Co. *v.* Palmer, 19 Wis. 574.

[2] 1 Mor. Priv. Corp., 2d ed., § 61.

[3] New York &c. R. Co. *v.* Hunt, 39 Conn. 75. Compare Ridgfield &c. R. Co. *v.* Brush, 43 Conn. 86.

[4] Migotti's Case, L. R. 4 Eq. 238. The same ruling was made on similar facts in Forbes and Judd's Case, L. R. 5 Ch. 270.

[5] Townsend *v.* Goewey, 19 Wend. (N. Y.) 424; *s. c.* 32 Am. Dec. 514.

[6] Glover *v.* Tuck, 24 Wend. (N. Y.) 158; Paine *v.* Thacher, 25 Wend. (N. Y.) 452; Robinson *v.* McIntosh, 3 E. D. Sm. (N. Y.) 231.

enforced in an action at law;[1] the law will not *imply* a promise from one partner to another in respect of their common concerns.[2]

§ 1256. **Each Subscription Several, not Joint.** — Each subscription to the capital stock of a corporation is an independent undertaking, and is in no way affected by the terms of other subscriptions;[3] and the obligation of each of several subscribers to the same agreement of subscription is several and not joint,[4] and each subscriber is liable only for the amount set opposite his own name.[5] Thus, A. subscribed for fifty shares in a railroad company in his own name, and for fifty others, adding the abbreviation "Exr." to his signature, saying that he would take fifty shares for an estate of which he was executor. These were separate contracts, and the pendency of a suit to enforce the former could not be pleaded in abatement of a suit to enforce the latter.[6]

§ 1257. **Subscription by a Partnership Name.** — A subscription by a partnership name is a sufficient compliance with a statute which requires that a subscriber to the articles of incorporation shall subscribe thereto "his name, place of residence, and amount by him subscribed." [7]

§ 1258. **Subscriptions Construed by the Court.** — As in the case of all other written instruments,[8] the subscription is inter-

[1] Townsend *v.* Goewey, *supra.*

[2] Crater *v.* Bininger, 45 N. Y. 548; Townsend *v.* Goewey, *supra.* That one partner may sue another at law upon a breach of a covenant, see Duncan *v.* Lyon, 3 Johns Ch. (N. Y.) 351; *s. c.* 8 Am. Dec. 514 (learned opinion by Chancellor Kent); Rondeau *v.* Pedesclaux, 3 La. 510; *s. c.* 23 Am. Dec. 463. That actions at law may lie by one partner against another on an express covenant touching the partnership affairs is recognized in the following English cases: Venning *v.* Leckie, 13 East, 7; Neale *v.* Turton, 4 Bing. 149; Preston *v.* Strutton, 1 Anstr. 50; Coffey *v.* Brian, 10 Moore, 341; *s. c.* 3 Bing. 54.

[3] Connecticut &c. R. Co. *v.* Bailey, 24 Vt. 465; *s. c.* 58 Am. Dec. 181; Erie &c. R. Co. *v.* Patrick, 2 Keyes (N. Y.), 256.

[4] Price *v.* Grand Rapids R. Co., 18 Ind. 137; Herron *v.* Vance, 17 Ind. 595.

[5] Price *v.* Grand Rapids R. Co., *supra.*

[6] Erie &c. R. Co. *v.* Patrick, 2 Keyes (N. Y.), 256. As to joinder in Equity, see Herron *v.* Vance, 17 Ind. 595.

[7] Ogdensburg &c. R. Co. *v.* Frost, 21 Barb. (N. Y.) 541.

[8] 1 Thomp. Tr., § 1065 *et seq.*

preted by the court, and not by the jury, unless in cases where parol evidence is admitted to explain latent ambiguities therein.[1]

§ **1259. Construed According to what Law.** — The prevailing and only sound view is that the contract of subscription is to be construed according to the law of the *domicil of the corporation;* for it is by that law that the corporation is called into existence and governed, and the reasonable assumption is that both parties contract with reference to that law.[2] One court has reached the same conclusion, by applying the familiar rule that, where a contract, either expressly or by implication, is to be performed in a place other than that where it was executed, then, according to the presumed intent of the parties, its validity, effect and interpretation, are to be governed by the law of the place of performance; so that, where the subscription is to the capital stock of a railroad company chartered by another State and having its place of business there, it is equivalent to an agreement to pay the sum subscribed to the treasurer of the corporation or other duly authorized agent; and where no place of payment is specified, it is presumed to have been the intention of the parties to pay the assessments in the State where the corporation is established and carries on its business.[3]

§ **1260. Taking Shares to Qualify as Director.** — Where it is necessary to hold a certain number of shares in order to be qualified to act as a director, it has been held that the mere fact that a person accepts the office of a director does not make him a shareholder in respect of the number of shares necessary to qualify him so to act; it merely implies an agreement that he will qualify himself within a reasonable time; and he may so qualify himself by purchasing shares from other members as well as from the company.[4] But the English courts have several

[1] Monadnock & Co. *v.* Felt, 52 N. H. 379.

[2] Payson *v.* Withers, 5 Biss. (U. S.) 267, 278; Seymour *v.* Sturgess, 26 N. Y. 134; Merrick *v.* Van Santvoord, 34 N. Y. 208, 210; McDonough *v.* Phelps, 15 How. Pr. (N. Y.) 372; Ex parte Van Riper, 20 Wend. (N. Y.) 614; *ante,* § 1137.

[3] Penobscot &c. R. Co. *v.* Bartlett, 12 Gray (Mass.), 244; *s. c.* 71 Am. Dec. 753.

[4] Brown's Case, L. R. 9 Ch. 102; Karuth's Case, L. R. 20 Eq. 506; Mar-

times held that where a person accepts the office of director, and is advertised and acts as such for a considerable length of time, he will be held as a contributory in respect of the number of shares necessary to qualify him to act as such.[1] In his decision in Harward's case,[2] Vice-Chancellor Malins proceeded on the broad ground that if a man knows that, by the constitution

quis of Abercorn's Case, 4 De G. F. & J. 78; Hamley's Case, 5 Ch. Div. 705; Barber's Case, 5 Ch. Div. 963. See also Forbe's Case, L. R. 8 Ch. 768; Chapman's Case, L. R. 2 Eq. 567; Lord Claud Hamilton's Case, L. R. 8 Ch. 548; Maitland's Case, 3 Gif. 28. See Lind. Comp. L. 794, where other authorities are reviewed. In Tothill's Case, L. R. 1 Ch. 85, a director of a company, in which fifty shares was the necessary qualification of a director, signed the articles of association as a holder of twenty-five shares, but applied for and paid the deposit on fifty shares. A resolution was passed at a meeting of the directors, which incidentally recited the list of shareholders, and among them this director as the holder of fifty shares. No allotment of the shares was made. The director was not present at the meeting at which the resolution was passed, and denied all knowledge of the resolution, although he was present at the next subsequent meeting. In the absence of proof that the minutes of the previous meeting were duly read and confirmed at the subsequent meeting (which, it appears, was not always done), the lords justices held that the director should be a contributory only in respect of the twenty-five shares for which he had executed the memorandum of association. In Austin's Case, L. R. 2 Eq. 435, the promoter of a bank invited Austin to become one of the board of directors, and a prospectus (marked "preliminary and private," in which his, Austin's name, appeared as a director) was shown to him. To this proposition Austin assented, provided he should be satisfied that a certain proportion of the capital had been subscribed, and that certain persons named in the prospectus as directors would actually join the board. With a view of ascertaining the correctness of statements contained in the prospectus, Austin attended a board meeting, and so far identified himself with the board as to sign a check for £500 with another director. Stock was taken by others (in at least one instance) on the faith of statements contained in the prospectus to which his name was attached as a director. On receiving, a few days after the meeting, a letter of allotment of the shares necessary to qualify him as a director, Austin at once returned it, declining, at the same time, to act as director, as he was not satisfied upon the two points stipulated for by him. The secretary wrote back, stating that his "resignation" had been accepted. Austin had nothing more to do with the bank. In considering these facts, the vice-chancellor pronounced this a very doubtful case; but, in view of the fact that the letter of allotment was properly returned, thought that it must be taken that the whole matter was not finally concluded, and that his name, therefore, must be removed from the list of contributories.

[1] Harward's Case, L. R. 13 Eq. 30; Stephenson's Case, 45 L. J. (Ch.) 488; Fowler's Case, L. R. 14 Eq. 316.

[2] L. R. 13 Eq. 30.

of the company, the qualification of a director is a certain number of shares, it is an implied contract with the shareholders that if he acts as director he must take at least that number of shares.[1] "I cannot," said he, "part with this case, without expressing my strong opinion, which ought to be universally known by gentlemen, whether they are commercial men or otherwise, that they will not be permitted by the law of this country to sit at a board of directors upon the understanding that they are to receive their remuneration as directors, and if the affair is profitable take the profit, but if losses occur they are not to be liable." The decision of Vice-Chancellor Malins in which this language was employed was reversed by the lords justices, upon a construction of a resolution passed by the company relating to the qualification of directors;[2] but the wholesome doctrine thus expressed was not denied. Language, if possible more strong, was used, in an earlier case, by Vice-Chancellor Bacon. "In my opinion," said he, "the case is as plain as anything can be. Being named as a director, he became liable to take twenty-five shares. By acting as a director he recognized his liability in that respect. That is indelible."[3]

[1] See his language in Lord Claud Hamilton's Case, L. R. 8 Ch. 548, note, where he thus explains Harward's Case.

[2] Lord Claud Hamilton's Case, L. R. 8 Ch. 548.

[3] Fowler's Case, L. R. 14 Eq. 316. In this case the articles of association provided that no person should be eligible as director unless at the time of his appointment he should hold twenty-five shares. On February 14, 1867, the directors of the company were appointed, and at the same time it was resolved to allot twenty five shares to each of the persons named as directors. One of these directors who had consented to act as such, but in ignorance, as he stated, that any shares had been allotted to him, and under the mistaken impression that the necessary qualification was twenty £25 shares and not twenty-five £20 shares, applied, March 1, 1867, for twenty shares, which were allotted to him. He attended meetings and acted as director until just before November, 1867, at which date the company was ordered to be wound up. His name having been placed upon the list of contributories for forty-five shares, he made application to be relieved as to twenty shares. It appeared that he was present at the next meeting subsequent to the allotment of the twenty-five shares, but believed he was not present during the reading of the minutes of the previous meeting. He stated that he did not become aware of the al'otment of the twenty-five shares until June, 1867. The vice-chancellor considered that the circumstances of the allotment of the twenty-five shares were such that he ought to have known they were allotted; and, as he had applied for

§ 1261. Continued. — Where, prior to the formation of a company, the provisional directors had agreed to take 100 shares each, to execute the articles and memorandum of association when ready, and to act as directors of the company, and the articles provided that the subscribers of the memorandum should be deemed to be directors until others were appointed, and that each director should hold at least 100 shares, it was held that they were contributories to the extent of their respective qualification shares. The decision was placed on the ground that, it having been the duty of the provisional directors themselves to appoint directors, and default having been made by them in so appointing, they were to be deemed in equity as having appointed themselves, and were chargeable accordingly.[1] Nor is it to be inferred that if a person consents to become a director, and has allotted to him the number of shares necessary for his qualification, and in fact acts as a director, an agreement will not be implied to accept the shares.[2] The true result to be drawn from the English authorities, as stated by Lord Selborne, is, "that the fact of a man accepting the place of director, for which the possession of a certain number of shares is a necessary qualification, is most material in determining whether he shall or shall not be permitted to repudiate, as unauthorized by himself, the registration of shares which, in the ordinary course of the business of the company, have actually been placed in his name, and which were needful for his qualification." [3] A mere colorable device, the effect of which is that the company itself furnishes the money necessary to purchase and pay for the qualifying shares of a board of directors, will be set aside in equity; such shares will be deemed not to have been paid for, and the directors will be put upon the list of contributories accordingly.[4]

twenty other shares, he must remain upon the contributory list for the whole forty-five.

[1] Currie's Case, 3 De G. J. & S. 367; *s. c.* 32 L. J. (Ch.) 424.

[2] Brown's Case, L. R. 9 Ch. 110, *per* Mellish, L. J.; Leeke's Case, L. R. 6 Ch. 469.

[3] L. R. 9 Ch. 107.

[4] Re Disderi & Co., L. R. 11 Eq. 242. In this case a company was formed to purchase and carry on the business of D. The shares were £10 each, and were to be paid up in full on acceptance. The qualification of the directors was twenty-five shares each, and by the articles of association £170,000 in paid up shares of

§ 1262. Limit of Option to take Shares on Reorganization. — On the reorganization of an English company by a scheme for a sale of its property to a new company and an exchange of shares at the option of the old shareholders, where a

the company was the limit in price beyond which the directors were not to go in the purchase. Great difficulty was experienced in finding the eight necessary directors who were willing to qualify as such by taking twenty-five shares. Finally, eight persons agreed to act as directors on having their qualification found. The first meeting of the company took place on June 22d, at which these gentlemen acted as directors, and their names were entered on the list for the twenty-five shares required for the qualification of each of them. On June 25th they signed the contract for the purchase of the business of D. The consideration was £168,000 in fully-paid shares of the company and £2,000 in cash. At this time the directors paid for their shares, and the company paid the £2,000 in cash to D. by the following arrangement: The directors having agreed to serve only on condition that their shares were found by D., his agent drew eight checks in the name of D. for £250 each, one of which he handed to each of the directors, who passed over the same by indorsement to the secretary of the company in payment of their shares. The directors' shares were then entered as fully paid up. The secretary of the company then handed the eight checks to D.'s agent, who drew up and signed a receipt for £2,000 paid by the company on their purchase, according to the contract. The company was subsequently ordered to be wound up, and the directors having been placed upon the list of contributories, on the ground that nothing had ever been paid upon their shares, the directors applied to have their names struck off. The vice-chancellor (Malins) was unable to see that the transfer of checks constituted a payment for the shares of the directors. He does not appear to have brought his mind down to a coniderance of the details of the transaction, but he denounced it in heated language as "unworthy of a school-boy," "a ridiculous farce," and the directors as "creatures, dummies, and nominees" of D., the vendor. He considered that these eight persons were bound to take shares before acting as directors, and that, at least, they were now to be treated as persons who, having agreed to take shares, had not paid them up, and that they must pay them up in full.

It is not clear to the author that the transaction merited the epithets of the learned vice-chancellor. On the contrary it seems *bona fide* throughout. In fact D. foregoes £2,000 of the price agreed upon in order that the purchase of his business may be consummated. If the price paid for D.'s business had been exhorbitant, and the directors had willfully violated their trust in contracting to pay the same, and as a consideration for such breach of trust the directors' qualification of shares had been supplied as above, it is obvious the transaction could not stand. But such was not the case; the price paid was within the limit prescribed by the articles of association, and nobody could be found who would consent to serve as director unless his qualification of shares was found. The vice-chancellor, in this case, based his decision on the authority of Gray *v.* Lewis, L. R. 8 Eq. 526.

trustee is given full discretionary power to dispose of shares not taken by them, the scheme is not vitiated by the insertion of a limited time within which the shareholders must exercise their option, provided the time is reasonable.[1]

In this case the Lafitte Company was formed, to purchase the business of the Paris Bank of Lafitte. The Paris Bank declined to transfer its business to the company until 40,000 shares should have been subscribed for. To effect this object, the International Contract Company guaranteed a subscription of the requisite number of shares. The latter company then applied to the National Bank to discount their bills for £230,000, which they agreed to do on the guarantee of the Lafitte Company that they would leave in their hands whatever money should be paid in for shares, to the amount of the advance. The money was thereupon transferred to the credit of the Contract Company, who provided shareholders and paid the deposits out of the advances by the bank. In order to procure a settling-day on the stock exchange, the bank certified that the £230,000 had been deposited with them in payment of shares. The Lafitte Company, by their articles of association, were prohibited from purchasing their own shares. The Lafitte Company was ordered to be wound up, having never acquired the business of the Paris Bank. A shareholder of the Lafitte Company filed a bill against the directors of that company, and against the National Bank, praying for the restoration of the £230,000 to the Lafitte Company by its directors and the National Bank. The vice-chancellor (Malins) held that the directors of the Lafitte Company had acted *ultra vires*, and committed a breach of trust in applying the funds of the company in repaying the money so advanced by the bank; and that the bank, having been participators in the breach of trust, must refund the amount. As to the meaning of the expression in English articles of association, applied to the qualification shares of directors, "shall hold the shares in his own right," see Pulbrook *v.* Richmond Consolidated Mining Co., 9 Ch. Div. 610; with which compare Bainbridge *v.* Smith, 41 Ch. Div. 462; *s. c.* 60 L. T. (N. S.) 879. As to the qualification of directors, see *post*, § .

[1] Postlethwaite *v.* Port Phillip &c. Gold Min. Co., 43 Ch. Div. 452. See *ante*, § 274. Legality of stock issued pursuant to N. Y. Laws, 1874, Chap. 430, authorizing the reorganization of railroad corporations sold in foreclosure &c.: Re Brooklyn Elev. R. Co. (Sup. Ct.) 32 N. Y. St. Rep. 1065; 11 N. Y. Supp. 161.

CHAPTER XXII.

ALTERATION OF THE CONTRACT.

§ **1267. Preliminary.**— The question what amendments of the charter of a corporation, not assented to by a stockholder, will release him from the obligation of his contract, has been considered in a former chapter.[1] The question presents itself in

[1] *Ante*, § 66 *et seq.*

new relations where the change has taken the form of the alteration of the articles of association, of the subscription paper or of the prospectus, by the act of the directors or the majority of the corporators without legislative action; and this seems to require some additional treatment of the subject, though at the risk of repetition.

§ **1268. Breach by the Corporation of its Contract with the Subscriber.**— Where the contract of subscription contains interdependent covenants, a substantial breach of its conditions by the corporation will, where the rights of third persons are not concerned, release the subscriber.[1] The usual application of this rule obtains in England where the *prospectus* of a joint-stock company holds out certain promises to subscribers, on the faith of which they put down their names, and the *memorandum*, when drawn up, so far departs from the prospectus as to make substantially a different contract.[2] It obtains in America where the charter is radically or fundamentally altered by the legislature, or the articles of association by the corporators, or the contract of subscription by the directors, without the authorization of an existing statute, and without the consent of the particular subscriber, subsequently to his subscription. The rule has reference only to *material* alterations. The liability of a stockholder, for instance, is not affected by immaterial changes in the articles of incorporation.[3]

§ **1269. Alteration of the Subscription Paper.** — A mere mechanical alteration of the subscription paper, which does not have the effect of *altering the contract* of the subscriber, and which is not so intended, will not, of course, release him: as where *printed forms* of the contract of subscription, which had been circulated and signed separately were cut from the rest of the papers, and all the written parts were attached to one of these printed forms, which was then filed in the office of the Secretary of State for the purpose of organizing the corpora-

[1] Hartford &c. R. Co. *v.* Croswell, 5 Hill (N. Y.), 383; *s. c.* 40 Am. Dec. 354.

[2] Lind. Comp., 5th ed., p. 19.

[3] Union Agricultural &c. Association *v.* Neill, 31 Iowa, 95.

tion.[1] But if the certificate of incorporation, prescribed by the governing statute, which was originally executed, is abandoned by the co-adventurers, and a *new and different certificate* executed, and the organization takes place under the latter, the association cannot hold the subscriber under the provisions of the former; [2] for this is a contract to which he has not agreed.

§ 1270. **Making Radical Changes in the Purposes of the Corporation.** — But if, as hereafter seen,[3] the legislature cannot change the contract of the subscriber without his consent, for stronger reasons the directors, or the executive committee, or the other stockholders, will not be permitted to make a radical change in the business of the corporation which shall bind a dissenting subscriber, — as by selling its entire property; [4] or by exchanging its assets upon dissolution for stock in another company;[5] or by consolidating the corporation with another to form a new corporation,[6] or, in case of a railroad company, by departing substantially from the *route* marked out in its charter; [7] or, in case of a plank road company, by extending the road and increasing the capital stock without complying with the provisions of the charter on that point.[8] And one court has gone so far as to say that any material departure from the points designated in the charter for the location of the road, is a violation of the charter, for which the franchise of the corporation may be seized upon *quo warranto*, unless the legislature has waived the right of the State to seize the franchise, by acts legalizing the violations of the charter.[9]

[1] Sodus Bay &c. R. Co. *v.* Hamlin, 24 Hun (N. Y.), 390. See, as to the effect upon the liability of a subscriber of altering the articles of association, note in 19 Am. & Eng. Corp. Cas. 258.

[2] Burrows *v.* Smith, 10 N. Y. 550.

[3] *Post*, § 1273.

[4] Abbot *v.* American Hard Rubber Co., 21 How. Pr. (N. Y.) 200; *s. c.* 20 How. Pr. (N. Y.) 204; 11 Abb. Pr. (N. Y.) 208; 33 Barb. (N. Y.) 584.

[5] Frothingham *v.* Barney, 6 Hun (N. Y.), 366.

[6] Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) (N. Y.), 437; *s. c.* 37 How. Pr. (N. Y.) 113; 54 Barb. (N. Y.) 46; Clearwater *v.* Meredith, 1 Wall. (U. S.) 40; *ante*, § 75.

[7] Buffalo &c. R. Co. *v.* Pottle, 23 Barb. (N. Y.) 23.

[8] Macedon &c. Plank Road Co. *v.* Lapham, 18 Barb. (N. Y.) 315.

[9] Dictum in Mississippi &c. R. Co. *v.* Cross, 20 Ark. 443; citing People *v.* Manhattan Co., 9 Wend. (N. Y.) 351.

§ 1271. Directors Departing from the Charter. — The directors of a corporation are trustees for its shareholders, and if they depart from the charter, or attempt, or threaten to do acts which are *ultra vires* in respect of their granted powers or the powers of the corporation, and injurious to the shareholders, — the latter have a remedy in equity to restrain them from so doing.[1] But there is no known principle on which the fact that the directors are exercising their powers wrongfully can absolve a subscriber from the performance of his contract. How can he, as against other subscribers, suffering in common with him, claim to be released, upon the mere ground that the officers whom a majority have placed in power are exercising their power unlawfully? It has accordingly been held that a corporation cannot be *enjoined* from enforcing a judgment for a stock subscription on the ground of a departure from its charter in respect of matters not connected with the suit;[2] or on the ground that the work of building a railroad which the corporation was chartered to build was not progressing in the manner prescribed in the charter, or that the company contemplated a departure from the route, or a change in the *termini* designated therein.[3] Nor will such stockholders of a corporation created "to build and maintain a *flouring mill*" be so relieved because the corporation is expending its money in *building a dam* by means of which to obtain power to run its mill.[4] And it may easily be concluded that it is not every unimportant change in the project, as marked out, which will dissolve the contract of subscription.[5] Accordingly, a mere *cessation of work* on a road within a very short distance of the *terminus* designated in the articles of incorporation, where the articles are not changed, and there is no resolution of the directors providing for a termination of the road at the point where the work is stopped, is not such a change as will work a release of the contract of a non-assenting stockholder.[6] But it has been observed that the power of a corporation over the rights of a stockholder, however to be exercised, is limited to his rights in the corporate

1 *Post*, Ch. 90.

2 Ex parte Booker, 18 Ark. 338.

3 *Ibid.*

4 Ginrich *v.* Patrons' Mill Co., 21 Kan. 61.

5 Clearwater *v.* Meredith, 1 Wall. (U. S.) 40.

6 Buffalo &c. R. Co. *v.* Clark, 22 Hun (N. Y.), 359.

property and corporate concerns, and does not extend to his *private* and individual *property*, over which the corporation has no control beyond the amount of his subscription. The power of a majority of the members to accept an amendment to the charter so as to bind the minority, is confined to such modifications thereof as are reasonably within the original objects of the incorporation, and as regard the corporate property. In all other cases, the stockholders can be bound only by their individual assent and acquiescence.[1]

§ **1272. Abandonment of the Enterprise** for which the corporation was organized,—as, by failing to commence the undertaking within the time prescribed by its charter,[2] and refunding some of the subscriptions;[3] or, in case of a railroad company, locating the road on an entirely different route,[4] — will discharge the stockholder. But the mere fact that the work on the corporate undertaking has been suspended is not such evidence of an abandonment of the enterprise as will discharge a subscriber from his obligation of payment; since the refusal of the subscribers to pay according to their contracts may be the very cause of the suspension, and the very object of the attempt to enforce their contracts may be to get money to revive or continue the prosecution of the work.[5]

§ **1273. Discharged by Legislative Alteration of the Contract.**— The general rule is that the relation between a corporation and a stockholder being one of contract, any legislative enactment which, without his assent, authorizes a material or fundamental change in the powers or purposes of the corporation, not in aid of the original object, if acted upon by the corporation, is not binding upon him.[6]

[1] Ireland *v.* Palestine &c. Turnp. Co., 19 Ohio St. 369.

[2] McCully *v.* Pittsburgh &c. R. Co., 32 Pa. St. 25.

[3] *Ibid.*

[4] Hester *v.* Memphis &c. R. Co., 32 Miss. 378; Winter *v.* Muscogee Ry., 11 Ga. 438; Kenosha &c. R. Co. *v.* Marsh, 17 Wis. 13; Champion *v.* Memphis &c. R. Co., 35 Miss. 692. *Post*. §1285 *et. seq.*

[5] See, in illustration of this, Buffalo &c. R. Co. *v.* Clark, 22 Hun (N. Y.), 359; Buffalo &c. R. Co. *v.* Gifford, 87 N. Y. 294. Compare Four Mile Valley R. Co. *v.* Bailey, 18 Oh. St. 208.

[6] McGray *v.* Junction R. Co., 9 Ind. 359; First National Bank *v.* Charlotte, 85 N. C. 433. *Ante*, § 67 *et seq.*

§ 1274. Change Must be Material, Fundamental or Radical.— The legislative change in the character of the enterprise which will thus release a subscriber, has been often described as *material, fundamental or radical;*[1] but it is more frequently described by the use of the word "fundamental."[2] If it vitally and radically affects rights established and fixed by charter, it cannot be forced upon an unwilling stockholder.[3]

§ 1275. Increasing Capital Stock.— Of this nature, as already seen,[4] according to the general course of decisions, are amendments increasing the capital stock.[5] But where, in addition to an amendment authorizing an increase of its capital stock, the legislature authorizes another fundamental change, such as changing the *termini* of a railroad,— this may release the subscriber.[6]

§ 1276. Reducing Capital Stock. — And it should seem that the same must be affirmed of an amendment reducing the capital stock of a corporation, and thereby rendering the success of the enterprise more doubtful.[7] Accordingly, it was held that a dissenting stockholder was released by an amendment of the charter of an insurance association, providing that the stock notes should be reduced by a credit of certain net profits.[8] Another court has taken a middle ground by holding that such an amendment will operate to discharge the existing subscribers *pro tanto* from the obligation of payment in accordance with the

[1] *Ante,* § 72; Snook *v.* Georgia Imp. Co., 83 Ga. 61; *s. c.* 9 S. E. Rep. 1104.

[2] Nugent *v.* Supervisors, 19 Wall. (U. S.) 241.

[3] Hoey *v.* Henderson, 32 La. An. 1069.

[4] *Ante,* § 78. Compare *post,* § 2088.

[5] Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336.

[6] *Ante,* § 74; *post,* § 1284. Where a railroad company obtains authority from the legislature to change one of its termini and to increase its capital stock without the consent of a subscriber to stock under the original charter, the latter is released from his subscription, though at the time thereof the general law, under which the first charter was obtained, authorized amendments increasing the capital stock, and changing the route, as such law did not authorize a change in the termini. Youngblood *v.* Georgia Imp. Co., 83 Ga. 797; *s. c.* 10 S. E. Rep., 124; Snook *v.* Georgia Imp. Co. 83 Ga. 61; *s. c.* 9 S. E. Rep. 1104.

[7] Oldtown &c. R. Co. *v.* Veazie, 39 Me. 571.

[8] Hoey *v.* Henderson, 32 La. An. 1069.

terms of their subscriptions. If, therefore, the amendment reduces the capital one-half, and, before the passage of such an amendment, they have paid one-half, they will have nothing further to pay.[1]

§ 1277. Increasing the Number of Shares.— But an alteration of the contract of subscription, increasing the number of shares, has been regarded as material, in the sense of what we are considering.[2] A strong illustration of this is found in a case where A., with others, signed a paper, which recited that a certain company had been incorporated, the capital stock of which was fixed at $50,000, and by the terms of which the subscribers agreed with each other and with the corporation to take the number of shares affixed to their respective names, and to pay therefor $100 a share. Opposite A.'s name was a certain number of shares. The whole number of shares subscribed for exceeded $50,000. At a meeting called for the purpose of organization, a committee was appointed to report the names of the subscribers to the original capital stock of $50,000. The committee reported a list of names not including A.'s. The meeting then voted to increase the stock to $100,000, and that all the subscribers be admitted to the company with the rights and privileges of stockholders under the agreement. A. subsequently paid three assessments on his stock. It was held that an action against him on the original paper, for a subsequent assessment, could not be maintained, even if he knew of these votes before paying his assessments.[3]

§ 1278. Enlarging Powers and Privileges and Adding New Responsibilities.— On principle, any amendment which enlarges the undertaking so as to entail new responsibilities or new hazards upon the corporation will release dissenting shareholders.[4]

[1] Woodhouse *v.* Commonwealth Ins. Co., 54 Pa. St. 307.

[2] Bery *v.* Marietta &c. R. Co., 26 Ohio St. 673. Compare *post*, § 2088.

[3] Katama Land Co. *v.* Jernegan, 126 Mass. 155.

[4] Union Locks and Canal *v.* Towne, 1 N. H. 44; *s. c.* 8 Am. Dec. 32. As by adding to the powers of a *railroad* company the power to purchase *steamboats*: Hartford R. Co. *v.* Croswell, 5 Hill (N. Y.), 383; *s. c.* 40 Am. Dec. 354. Compare Chesapeake &c. Co. *v.* Robertson, 4 Cranch C. C. (U. S.) 291.

But this effect cannot be ascribed to an amendment of a charter or act of incorporation which merely enlarges the powers or privileges[1] of the corporation, without materially changing its original purposes,[2] or authorizing a material departure from its original design,[3]— as by conferring upon it the power of declaring *forfeitures* of its stock.[4] One court has asserted the doctrine that an enlargement by the legislature of the powers originally granted to a corporation, although such enlargement may embark the corporation in more expensive schemes which will require a greater capital, does not have the effect of discharging one who had subscribed to its capital stock before such enlargement. Such a grant of additional privileges to a corporation did not impair the obligation of previous contracts of subscription, within the meaning of the constitutional inhibition against the passage of laws impairing the obligation of contracts. That inhibition, the court reasoned, has reference to *direct*, and not to merely *consequential* invasions of contracts.[5] Upon this principle State laws have been upheld as valid which abolish imprisonment for debt;[6] which confirm titles imperfect under the recording laws;[7] which levy a tax upon the property of a corporation previously created;[8] or which incorporate a rival bridge company, with power to construct a bridge so near to one already existing as materially to diminish the profits of the existing company.[9]

§ 1279. Illustrations: Authorizing Extension of Road — Building of Branch. — Such a consequence is not to be ascribed to an amendment to a charter of a railroad company, which authorizes

[1] Poughkeepsie &c. Plank Road Co. *v.* Griffin, 21 Barb. (N. Y.) 454.

[2] Peoria &c. Co. *v.* Preston, 35 Iowa, 115.

[3] Pacific Railroad *v.* Hughes, 22 Mo. 291; *s. c.* 64 Am. Dec. 265.

[4] Peoria &c. R. Co. *v.* Elting, 17 Ill. 429.

[5] Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156; *s. c.* 37 Am. Dec. 500. See also Everhart *v.* Philadelphia &c. R. Co., 28 Pa. St. 353; Pittsburgh &c. R. Co. *v.* Biggar, 34 Pa. St. 455; Pittsburgh &c. R. Co. *v.* Woodrow, 3 Phila. (Pa.) 271.

[6] Mason *v.* Haile, 12 Wheat. (U. S.) 370.

[7] Watson *v.* Mercer, 8 Pet. (U. S.) 88.

[8] Providence Bank *v.* Billings, 4 Pet. (U. S.) 514.

[9] Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420.

it to extend its road,[1] or to build a branch road where the company has not undertaken to build it,[2] or even where it has.[3]

§ 1280. Illustrations Continued: Empowering a Slack Water Company to Extend its Dams and Incur Additional Expense. — In an action by a navigation company against a subscriber to its capital stock, to recover certain assessments made thereon by the board of directors, it was pleaded, as a defense, that since his contract of subscription, the legislature had passed an act authorizing the corporation to extend its dams, thereby increasing the amount of its indebtedness beyond what its charter permitted when the defendant became a stockholder. It was held that this was not a good defense to the action. In so holding Gibson, C. J., speaking for the court, reasoned as follows: "An act to incorporate a company for purposes of slack water navigation is as essentially of a public nature as is an act to incorporate a company for the purpose of making a turnpike road. In this instance, then, what has the legislature of Pennsylvania done? It has not pretended to take away any corporate franchise, or to impinge upon any right before granted. That is not pretended. On the contrary, it has enlarged a corporate privilege. But the exercise of it, it is alleged, may plunge the company into an expense not originally contemplated. What of that? The defendant is not bound to contribute to it beyond the amount of his original subscription, and as to that his contract remains the same. But it is said that by taking off the limitation of the company's expenditure, the legislature has altered its power to incur responsibility for greater damages than it otherwise could have done. In that lies the fallacy. The legislature has not made it incumbent on the company to use the additional privilege granted to it, but has left the use of it to its discretion. It may in fact never use it; and whether it shall do so will depend on the volition of the defendant's corporate agents, the president and managers, by whose acts he is necessarily to be bound as his own, even in the acceptance of a modification of the charter for the public good, provided it do not extend to a change of the structure of the association. * * * Such improvements or alterations are frequently made, and subscriptions to the stock are consequently in subordination to the practice. At all events, it is sufficient for the argument that the constitutional re-

[1] Rice *v.* Rock Island &c. R. Co., 21 Ill. 93; Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392; Buffalo &c. R. Co. *v.* Dudley, 14 N. Y. 336.

[2] Hawkins *v.* Mississippi &c. R. Co., 35 Miss. 688.

[3] Greenville &c. R. Co. *v.* Coleman, 5 Rich. (S. C.) 118. *Contra*, Stevens *v.* Rutland &c. R. Co., 29 Vt. 545.

striction has been restrained by the ultimate tribunal, to interference directly with the terms of the contract, and not merely with its incidents."[1]

§ 1281. Changing the Nature of the Enterprise. — An amendment to the charter of a *railway company*, adopted without the consent of one who has previously become a subscriber to its capital stock, which superadds to the original object of the corporation an authority to establish a *line of water communication* in connection with the railroad, which will involve large additional expense, which amendment provides for an increase of the capital stock for that purpose, releases such stockholder from his subscription, although the amendment is accepted by the board of directors and also by a majority of the stockholders.[2] The same is true of an amendment to a *life and accident* insurance company, changing it to a *life*, *accident*, *fire*, *marine* and *inland* insurance company.[3]

§ 1282. View that Change Sanctioned by Majority Binds Minority. — The limitation on the rule of the majority agreed on by most American courts has already been pointed out.[4] An early case in Virginia seems to have asserted a broader doctrine. A member of an incorporated insurance company was held to be bound by a statute which varied the terms of the original act of incorporation, such act being passed at the instance of a legal meeting of the company, though he was not present at the meeting. The reasoning of the judges in that case is tantamount to a broad declaration that the charter of a corporation may be surrendered and a new charter accepted by the act of a majority of the corporators, if done at a regular meeting duly notified, and that there is no distinction in this respect between the passage by an incorporated society of an ordinary regulation and a surrender which destroys a fundamental one, — Judge Roane

[1] Gray *v.* Monongahela Nav. Co., 2 Watts & S. (Pa.) 156 (1841); *s. c.* 37 Am. Dec. 500, 503.

[2] Hartford &c. R. Co. *v.* Croswell, 5 Hill (N. Y.), 383 (1843); *s. c.* 40 Am. Dec. 354. To the same effect see Indiana &c. Turnpike Co. *v.* Phillips, 2 Penn. 184; McCullough *v.* Moss, 5 Denio (N. Y.), 580; Troy &c. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 606.

[3] Ashton *v.* Burbank, 2 Dill. (U. S.) 435.

[4] *Ante*, § 72.

saying: "The effect as to the question before us is precisely the same." Judge Fleming answered the objection to the power of the majority to bind the minority by the acceptance of the charter by saying: "It would be misspending time to refute this argument, as in all institutions of this kind the acts of a majority are binding on the whole: by the civil law that majority must consist of two-thirds of the members."[1]

§ **1283. Changing the Name.** — Changing the name of the corporation, as already seen,[2] is not such a material alteration as releases dissenting subscribers.[3] Where the name of the corporation was given in the preliminary subscription paper, but when the company was organized the words "Saint Louis" were added to the name, — it was held that this was no defense to an action on the subscription.[4]

§ **1284. Changing the Termini of a Railroad.** — We have already seen that there is a conflict among the decisions, growing out of opposing theories as to the governing principle, on the question whether an amendment of a charter changing the *terminus*, or the *termini* of a railroad, will release a dissenting subscriber.[5] Several cases not there cited exhibit the same opposing theories, or else opposing views as to the proper application of the same theory, — some reaching the conclusion that a material change in one of the *termini* of a railroad, authorized by the legislature, will release a dissenting stockholder;[6] and others holding that it will not.[7] Under the theory of the former cases, where the route is not expressly stated in the contract of subscription, the charter of the company, as it exists at the time, is the *law of the contract*, and any subsequent change of termini from those therein prescribed, discharges the obligation of the

[1] Currie *v.* Mutual Assurance Society, 4 Henn. & M. (Va.) 315; *s. c.* 4 Am. Dec. 517, *anno* 1809.

[2] *Ante*, § 82.

[3] Racine &c. Bank *v.* Ayers, 12 Wis. 512.

[4] Haskell *v.* Worthington, 94 Mo. 560.

[5] That it will have this effect, see *ante*, § 74; that it will not, see *ante*, § 77.

[6] Kenosha &c. R. Co. *v.* Marsh, 17 Wis. 13; Delaware &c. R. Co. *v.* Irick, 23 N. J. L. 321.

[7] Terre Haute &c. R. Co. *v.* Earp, 21 Ill. 291.

subscriber, unless with his consent.[1] The difficulty of holding that a change of the terminus of a railroad which the company is chartered to build releases the dissenting subscriber, is of course lessened where, in addition to changing the terminus, the amendment of the charter otherwise enlarges the project, — as by authorizing it to run a line of steamers beyond the terminus,[2] or to increase its capital stock.[3] On the other hand, the Supreme Court of Illinois, ignoring all sound principle, have held that a subscriber to stock in a railroad company cannot avoid payment because the charter of the road has been so changed as to authorize the company to which the subscription was made to purchase stock in other railroad companies, even though the *terminus* of the road in which the stock was first subscribed is thereby changed.[4] It is needless to suggest that a stockholder in a railroad company, who seeks to avoid the payment of his subscription, on the ground that one of the *termini* was materially changed from that designated in the charter, must show that the alteration was made without his concurrence or consent.[5]

§ 1285. **Material Change of Location or Route will Release Subscriber.** — There is also a division of opinion among the courts upon the question what substantial or material change in the route of a railroad, or other road which the corporation is created to build, will operate to release a dissenting subscriber.[6] In some cases the difference of opinion is more apparent than real, involving rather the question of the nature and extent of the change, than affirming or disaffirming the principle that a material change releases the subscriber. The rule established by the weight of authority, and supported by reason and justice, is that a *material* change in the proposed route of a railroad invalidates the obligations of non-assenting subscribers to stock.[7]

[1] Witter *v.* Mississippi &c. R. Co., 20 Ark. 463.

[2] Marietta &c. R. Co. *v.* Elliott, 10 Oh. St. 57.

[3] Snook *v.* Georgia Imp. Co., 83 Ga. 61; *s. c.* 9 S. E. Rep. 1104. Thus, although at the time of the amendment, the general law, under which the first so-called charter was obtained authorized amendments to charters increasing the capital stock and changing the route, but without authorizing changes of termini. *Ibid.*

[4] Terre Haute &c. R. Co. *v.* Earp, 21 Ill. 291.

[5] North Carolina R. Co. *v.* Leach, 4 Jones L. (N. C.) 340.

[6] *Ante*, §§ 74, 77.

[7] Noesen *v.* Town of Port Washington, 37 Wis. 168; Champion *v.*

But not so in an immaterial change.[1] While some of the courts have, as elsewhere seen,[2] taken a distinction, so refined as to be almost dishonest, in respect of an agreement to locate a road on a certain route, holding that a promise is kept if they *locate* the road on that route though they do not *build* it there, thus "keeping the word of promise to the ear and breaking it to the hope," — one court, at least, has gone honestly to the substance of such a contract, by holding that a stock subscription made on the condition that the road should be "located" on a certain route is not complied with by locating it on that route by a *resolution* of the board of directors, and then building it on another route; but that the word "locate" means to *construct*, and that the subscription is avoided by the abandonment of the route agreed upon therein.[3] An early case in Massachusetts goes so far as to hold that a stockholder is released by such a change, although he had acted in several offices of the corporation, subsequently to the change, and had, as one of the directors, petitioned the legislature for such alteration.[4] The court reached this anomalous conclusion by reasoning that the contract of subscription between the shareholder and the corporation *is collateral* to his contract as a director and officer. Under this rule, if all the stockholders were to join in a petition to the legislature to make such an amendment to the charter, and the legislature should accede to the request, the fact would enable all the stockholders to retreat from their obligations and dissolve the company. This decision ignores the well-known maxim *volenti non fit injuria*. It is a sorry illustration of the primitive ideas, which sometimes take hold of judges of general high character and learning.

§ 1286. **Reasons of the Rule.** — Three reasons have been given by the courts for the conclusion that a material change of route releases a non-assenting subscriber. The first is applicable

Memphis &c. R. Co., 35 Miss. 692; Buffalo &c. R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21; Hester *v.* Memphis &c. R. Co., 32 Miss. 378.

[1] Cayuga &c. R. Co. *v.* Kyle, 5 Thomp. & C. (N. Y.) 659.

[2] *Post*, § 1345.

[3] Nashville &c. R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574.

[4] Middlesex Turnpike Corp. *v.* Swan, 10 Mass. 384; *s. c.* 6 Am. Dec. 139. See also Middlesex Turnpike Corp. *v.* Locke, 8 Mass. 268.

only in particular cases, depending on the situation of the subscriber, and applies in the case where the subscriber lives on the route of the road as first located. Here it is supposed that the benefit which will accrue to him from building the road near his residence and property may fairly be presumed to have been a strong inducement for his giving his subscription.[1] The second is that he may well consider the location of the road on a new route as an abandonment of the project to which he subscribed.[2] The third is even more substantial. It is that he subscribed to one venture, and, no matter what his motives for dissenting are, it is not competent for his co-adventurers, even with the aid of the legislature, to compel him to become a subscriber to a different venture. He has made one contract; they cannot force him into another.[3]

§ 1287. What Changes of Route or Location do not Release Subscriber. — On the other hand, it has been held that a *slight change* or deflection adopted by the company, from the route of a railroad first selected, does not absolve a stockholder who had not designated the route he desired to be selected,[4] — as where the road is made to pass through a county not named in the original articles of incorporation.[5] Again, it has been held that the fact that directors of a railroad company have procured an alteration of the charter, authorizing a change in the location of the road, and have changed the route accordingly, if the actual change of it is consistent with the original design and object of the enterprise, not materially varying the route, nor abandoning a terminus actually established at the time of subscription, will not release a stockholder from his subscrip-

[1] Hester *v.* Memphis &c. R. Co., 32 Miss. 378.

[2] *Ibid.* That a material change from the route and termini named in the contract of subscription is evidence of an *abandonment,* see Caley *v.* Philadelphia &c. R. Co., 80 Pa. St. 363.

[3] *Ibid.*; *ante,* § 71.

[4] Greenville &c. R. R. Co. *v.* Coleman, 5 Rich. (S. C.) 118. See White Hall &c. R. Co. *v.* Myers, 16 Abb. Pr. (N. S.) (N. Y.) 34.

[5] Jewett *v.* Valley R. Co., 34 Oh. St. 601; Armstrong *v.* Karshner, 46 Ohio State, 276; *s. c.* 24 N. E. Rep. 897. Compare Buffalo &c. R. Co. *v.* Pottle, 23 Barb. (N. Y) 21 (where the road abandoned two counties through which it was to have been constructed, and it was held that the subscriber was released).

tion, though made without his consent.[1] An early case in the Supreme Court of Illinois, relaxing sound principles still further, held that a subscriber to railroad stock will be liable to the payment of his subscription, although the legislature may have authorized, and the directors of the company may have adopted, a change of route from that first fixed by law, provided the change does not make an improvement of a different character, and his interest is not materially affected by the alteration.[2] Still more severe and indefensible on any conception of reason or justice are holdings in Pennsylvania to the effect that an amendment of the charter of a railroad, changing the location of its line, cannot be set up at all as a defense to an action for a previous subscription to its capital stock, nor can the fact that the subscriber became such upon the condition that the road should be located as originally projected.[3] A restored sense of justice led the court, at a more recent period, to hold, with some of the other American courts, that such a change may be treated by a non-concurring subscriber as an *abandonment* by the corporation of the contract into which he entered with them.[4]

§ **1288. What Change of Route by Directors will Release the Subscriber.**— On principle, there can be no difference between the case where a material change of route has been authorized by the legislature, or made by the directors without the consent of the subscriber; for the legislature has no more power to impair the obligation of his contract than the directors have. When, therefore, a party has given a subscription on condition that the road is to be located on a certain route, a vote by the directors materially changing the route discharges his contract and enables him to recover from the corporation what he has paid thereon.[5] But it has been held that where the charter gives to directors power to determine the location of the road,

[1] Wilson *v.* Wills Valley R. Co., 33 Ga. 466.

[2] Banet *v.* Alton &c. R. Co., 13 Ill. 504.

[3] Pittsburgh &c. R. Co., *v.* Biggar, 34 Pa. St. 455; Pittsburgh &c. R. Co. *v.* Woodron, 3 Phila. (Pa.), 271.

[4] Caley *v.* Philadelphia &c. R. Co., 80 Pa. St. 363; *ante*, § 1272.

[5] Nashville &c. R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574.

it gives them, by necessary implication, power to change the location; and hence, where a representation has been made to induce a subscription, that a certain location has been adopted, a subsequent change of the location by the directors does not discharge the contract, though the first location was well known to be the inducement for the subscription.[1] But this decision must be ascribed to the influences which affected judicial decisions in this country in the era of railroad building, when the courts were so affected towards railroad enterprises as to be in many cases, when appealed to by scattered individuals against railroad companies, insensible to justice and careless of the law. The Kentucky Court of Appeals, in a case where a similar result was reached, were able to support their conclusion on more plausible grounds, though it may be doubted whether the same court would render the same decision now, if it were an original question. The court held that where the directors of a railroad were authorized by the charter to vary the route and change the location of the road whenever a cheaper or better route could be had, a change of location which placed the road upon a cheaper route, and procured a large additional subscription of stock, and also furnished a reasonable probability that the business and profits of the road, when finished, would be thereby considerably augmented, would not exonerate the subscribers from payment for their shares.[2] Under a statute[3] permitting a change of location by a railroad company on consent of the stockholders, provided that "any subscription of stock made on the faith of the location of such railroad, * * * upon any line abandoned by such change, shall be cancelled at the written request of the subscriber not having assented," — it has been held, that a subscriber who expressly stipulates against a change does not *waive* his right to enforce that condition by failing to make such a request.[4]

§ 1289. How the Defendant must Plead the Change. — As an immaterial change will not release the subscriber, he must, in

[1] Ellison *v.* Mobile &c. R. Co., 36 Miss. 572.

[2] Fry *v.* Lexington &c. R. Co., 2 Metc. (Ky.) 314.

[3] 73 Laws Ohio, 115.

[4] Railway Co. *v.* Fisher, 39 Oh. St. 330.

defending against an action on his subscription on this ground, *state facts* with sufficient particularity that the judge can see whether or not it was material. Therefore, a plea "that said road was not constructed in accordance with the charter," is bad.[1] A plea averring that a part of the stockholders had procured the passage of an act of the legislature, changing the provision of the charter as to the location of the road, and that the board of directors had adopted the same, but failing to show that it was so *accepted* as to make it binding upon the corporation, was held bad on demurrer.[2]

§ 1290. Consolidation with Another Corporation. — We have twice had occasion to observe already,[3] that the consolidation of the corporation to whose shares one has subscribed, with another corporation, is a change of such a *fundamental* character as to discharge his contract of subscription, provided he does not assent thereto, unless, at the time of the subscription there is a statute authorizing it,[4] or providing for the purchase of the shares of the dissenting stockholder.[5]

§ 1291. Changes Authorized by Existing Statutes. — From what has already been said,[6] if the change which the subscriber sets up as releasing him from the obligation of his subscription is authorized by a statute existing at the time of the subscription, which may fairly be deemed to enter into the contract, to affect it and to form a part of it, — it will not be deemed such a change as discharges his contract. He is deemed to have contracted with a view to the possibility of such a change being made by the will of the majority, and to have impliedly assented to it in advance.[7] If, therefore, a statute in force at the time a subscription to the capital stock of a railroad company is made, authorizes

[1] Champion *v.* Memphis R. Co., 35 Miss. 692.

[2] Mississippi &c. R. Co. *v.* Gaster, 24 Ark. 96.

[3] *Ante*, §§ 75, 343.

[4] Bish *v.* Johnson, 21 Ind. 299; Sparrow *v.* Evansville &c. R. Co., 7 Ind. 369; Hanna *v.* Cincinnati &c. R. Co., 20 Ind. 30. Compare Hayworth *v.* Junction R. Co., 13 Ind. 348.

[5] That it makes him a stockholder of the *new* company, see Ridgway Township *v.* Griswold, 1 McCrary (U. S.), 151.

[6] *Ante*, §§ 75, 343.

[7] Mowrey *v.* Indianapolis &c. R. Co., 4 Biss. (U. S.) 78.

an extension of the line of the road,[1] or the sale of the whole or a part of its road,[2] or a consolidation with another company,[3] — the exercise of this power will not affect the subscription.[4] But the principle which makes an existing applicatory statute a part of the contract of subscription operates both ways: and a material departure from what it prescribes discharges the contract.[5] It has been also held that the fact that such a change is made under an amendment to the charter, in a State where the legislature is empowered to alter or repeal acts of incorporation at pleasure, does not affect the application of the rule that a fundamental change in the character of an enterprise will release a subscriber thereto.[6]

§ 1292. Alteration Material to the Particular Subscriber. — Qualifying its earlier holdings,[7] the Supreme Court of Pennsylvania hold that an alteration departing from the terms of the contract, may operate to discharge a particular subscriber, on the ground that it is, *as to him and his interest*, a material variation, — as where the contract of subscription provided that the railroad should be built on a route which would bring it within five hundred feet of the subscriber's mill, and this was varied so as to adopt a route twelve hundred feet distant therefrom.[8] This is a pleasant contrast with the obvious injustice of the earlier holdings of the same court.

§ 1293. Changes Affecting the Payment of Stock Subscriptions. — It has been held that a subscriber to the capital stock of a railroad company, who agrees to be subject to the rules and regulations which may from time to time be adopted by the directors, cannot avoid payment because the charter has been amended, *reducing* the number of days of *notice* to be given, if the amendment of the charter has been accepted.[9] So, where

[1] Jewett *v.* Valley R. Co., 34 Ohio St. 601.

[2] Armstrong *v.* Karsner, 47 Oh. St. 276; *s. c.* 24 N. E. Rep. 897.

[3] *Ante*, §§ 75, 343.

[4] Nugent *v.* Supervisors, 19 Wall. (U. S.) 241.

[5] Witter *v.* Mississippi &c. R. Co., 20 Ark. 463.

[6] Kenosha &c. R. Co. *v.* Marsh, 17 Wis. 13.

[7] *Ante*, § 1278.

[8] Moore *v.* Hanover Junction &c. R. Co., 94 Pa. St. 324.

[9] Illinois River R. Co. *v.* Beers, 27 Ill. 185.

the articles of incorporation of a railroad company restricted the installments of stock that might be called for in any one year by the board of directors, to a certain percentage of the whole amount, and also provided for a change in the articles by the votes of the directors, a change in the amount and time of payment of the installments so made, which change was made in compliance with the governing statute, was held binding upon stockholders who subscribed previous to such alteration of the articles.[1]

§ 1294. Other Changes in the Internal Arrangements of the Corporation. — After a railroad company had been chartered, and, under the charter, subscriptions had been made to the stock, the legislature passed several amendatory acts, as follows: 1. To allow the stockholders to elect three additional managers. 2. That each share of stock should give the holder one vote to all elections of officers and other stock votes, provided he had held it for more than thirty days prior to such vote. 3. Authorizing an issue of preferred stock, which last amendment was accepted by a majority of the stockholders, and the stock was issued. It was held, that these acts created no such changes in the objects or organization or liabilities of the corporation, as to discharge one who had subscribed under the original charter, from liability on his subscription.[2]

§ 1295. Selling Out. — We have already seen,[3] that selling the entire corporate property to another corporation, or what is in practical effect the same thing, leasing it for 999 years, is such a fundamental change as releases a dissenting subscriber. If this cannot be done with the authority of the legislature so as to bind a dissenting stockholder, for stronger reasons it cannot be done without authority of law.[4]

§ 1296. Extending Time for Completing the Enterprise. — Additional holdings are found which support the proposition

Burlington &c. R. Co. *v.* White, 5 Iowa, 409.

[2] Everhart *v.* West Chester &c. R. Co., 28 Pa. St. 339.

[3] *Ante,* § 76.

[4] South Georgia &c. R. Co. *v.* Ayres, 56 Ga. 230. See also *ante,* § 1272.

already stated,[1] that an extension by the legislature of the time allowed by the corporation to the railroad company in which to build its road, will not release the subscribers to its stock,[2] although the obligation to construct it within the time first limited may have been, on the part of the subscriber, an essential inducement to the making of the contract.[3]

§ 1297. **Elements of Estoppel.** — On grounds heretofore and hereafter considered,[4] although a change may have been made of such a fundamental character as would release a dissenting subscriber, — yet unless he seasonably dissents and attempts a rescission of his contract, he may become bound on the theory of waiver, acquiescence or estoppel. Thus, a subscriber to a public work, who permitted it to be carried on without objection, could not, it was held, be relieved from the payment of his subscription on the ground that the plan was changed and that the work became of no benefit.[5] And where, in Tennessee, a corporation, organized by the permission of the chancery court, sued a subscriber to its stock upon his subscription, the latter, who had dealt with it as a corporation, could not deny the validity of the proceeding by which the name of the corporation was changed, although the subscription recognized the old name of the corporation.[6]

§ 1298. **Burden of Showing Dissent.** — If a subscriber is sued by the corporation on his contract of subscription, and defends on the ground of a material alteration of the contract, by the act of the directors, the corporation, or the legislature, it is, on principle, a necessary part of his defense that he did not assent to it, and the burden is on him to show that such was the fact.[7] But in Ohio it has been reasoned that the burden of showing such assent rests with the party seeking to hold the stockholder liable.[8] It is supposed that the form of the

1 *Ante*, § 82.

2 Jacks *v.* Helena, 41 Ark. 213.

3 Henderson *v.* Railroad Co., 17 Tex. 560, *s. c.* 67 Am. Dec. 675.

4 *Ante*, § 101 *et seq.*; *post*, §1877 *et seq.*

5 Doane *v.* Treasurer of Pickaway, Wright (Ohio), 752.

6 Greenville &c. R. Co. *v.* Johnson, 8 Baxt. (Tenn.), 332.

7 North Carolina &c. R. Co. *v.* Leach, 4 Jones L. (N. C.) 340.

8 Ireland *v.* Palestine &c. Turnp. Co., 19 Oh. St. 369.

pleadings may be such in a particular case as to justify this conclusion, — as where the corporation counts on the contract, and the subscriber admits the contract, but pleads the alteration, and the corporation replies, alleging his assent thereto. But where an alteration of the subscription paper is proved by the subscriber, in an action against him for calls, it has been held that the corporation must then prove that the alteration was made without its knowledge or consent; otherwise it cannot recover.[1]

§ 1299. When Validity of Amendment Submitted to Jury.— We have already seen that the question of the materiality of the alteration, in cases such as we are considering, is, like the question of the materiality of the alteration of any other written instrument, a question of law for the court, and is not to be submitted to a jury.[2] One case is found where, in seeming violation of this principle, the question was regarded as proper to be submitted to the jury. By a supplement to an act incorporating an iron and railroad company, the name of the company was changed, authority was given to purchase and cancel the original stock, and the main purpose of the new company was to be that of a general transportation company. The court held that it was a fair question for the jury, whether a combination to change the fundamental purpose of the original act by the supplement, and divert the stock of an original subscriber to this new end, was not a *fraud* upon him; and if they so found, an action for the amount of this original subscription could not be sustained.[3]

[1] Bery *v.* Marietta &c. R. Co., 26 Oh. St. 673.

[2] *Ante*, § 85.

[3] Southern Pa. Iron &c. Co. *v.* Stevens, 87 Pa. St. 190.